

HUMAN RIGHTS - ALTERNATIVE PROPOSAL BY MR. JUSTICE STAPLES.*

AUSTRALIAN CONCILIATION AND ARBITRATION COMMISSION

CHAMBERS.
LAW COURTS BUILDING
QUEENS SQUARE
SYDNEY, 2000

29 July 1983.

The Honourable R.J.L. Hawke, A.C. M.P.,
Prime Minister,
Parliament House,
CANBERRA. A.C.T. 2600

Dear Prime Minister,

Legislating to Uphold Human Rights

In 1977-78, at the invitation of the government of the day, I went to North America and Europe to study how other countries arranged in their laws and practices for the protection of human rights.

There are some basic standards of behaviour long since settled in the matter of human rights and many of these have been made the subject of international agreements, as in the declarations made in the United Nations General Assembly and in other bodies constituted by international agreement as, for example, under the Council of Europe.

There are three fundamental problems about legislating for human rights.

The first relates to the choice of ideas, and to the choice of language to express those ideas. An expression of values in such an exercise may well lead to the adoption of language that excuses a multitude of sins, or avoids particularity of meaning.

The second difficulty relates to the enforcement of the values adopted with a view to giving adequate relief to a victim. Promises made internationally to accord relief are affected by laws of procedure and of substantial right available to a wronged citizen in his domestic legal tribunals. The domestic institutions invariably used to carry out international obligation are not always already provided with appropriate remedies, yet it is generally desirable that they not be by-passed.

The third difficulty arises out of the fact that the concept of human rights is intimately related to the exercise of official power. Everyone has a view as to what ought and what ought not to be declared to be a "human right". Officials tend to have very strong views on such matters, and officials tend to make the laws.

*[This is the text of a proposal by Mr. Justice Staples, Deputy President of the Australian Conciliation and Arbitration Commission for Australian legislation in the field of human rights. As Mr. Justice Staples explains in his letter to the Prime Minister, he prefers an amended version of the European model.]

My best suggestion of a course for the Parliament to take is that it should turn away from the system declared at the United Nations in New York and that it should adopt the standards of the Council of Europe enforced at Strasbourg. In doing so, it should confine its laws to matters touching the affairs of the Commonwealth only and avoid matters arising under the ordinary authority of the States.

In 1979, I gave to the Attorney General of the day my draft of a "Rights and Freedoms Act". This draft puts forward the substance of the European Convention on Human Rights. I take the view that in this field of great controversy Australia ought at least not to fall short of Western Europe.

There is a singular advantage in this approach. We would almost automatically bring into our law the rulings on the Convention made by the European Court of Human Rights. There is a ready-made body of jurisprudence settled by this court of all democratic Europe now freely available for our guidance.

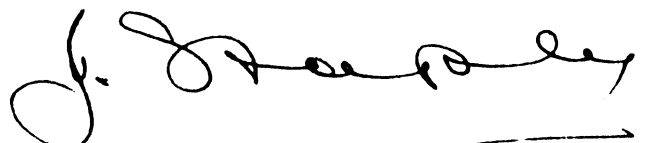
Permit me to advise you that my draft does not adopt the whole of the substance of the European Convention. I have made a number of very important omissions - although they are much of a kind. I have done this in aid of curtailing official power and of enhancing the immunity of individual citizens from oppression by those who act in the name of the state. I explained the reasons for these omissions on 3 August 1979 in a speech to the N.S.W. Council for Civil Liberties, a copy of which, I believe, is in the Parliamentary Library.

In that speech I also suggested a means of creating a counterpart here of the European Commission of Human Rights and the European Court of Human Rights in the event that some or all of the States here in Australia were minded to join together in an exercise which has already united such old enemies as Germany, France and the United Kingdom, to say nothing of Austria and Italy.

My draft seeks to approximate that European achievement. The whole scheme is aimed at abating the controversy that an earlier Commonwealth Bill generated. It would be odd, indeed, if our Commonwealth Parliament refused to go as far as Europe has done in this matter.

I propose to take the liberty, in due course, of circulating this letter and the draft bill to each member of the Parliament.

Yours faithfully,



J.F. Staples,
DEPUTY PRESIDENT.

To uphold and reinforce freedom in Australia and to secure the human rights of people in Australia.

1. This Act may be cited as the Rights and Freedoms Act 1979

2.
3. (1) In this Act, unless the contrary intention appears -

"act or practice" means

- (a) an act done or practice engaged in -
 - (i) by or on behalf of the Commonwealth or an authority of the Commonwealth; or
 - (ii) under an enactment; or
 - (b) an act done or practice engaged in wholly or partly within a Territory;
- "authority of the Commonwealth" means a body established for a purpose of the Commonwealth by or under an enactment;
- "human right" means any right, freedom, liberty, principle or privilege set down in the Schedule to this Act.

(2) For the purposes of this Act, refusing or failing to do an act, or delaying for an unreasonable time the doing of an act, shall be deemed to be the doing of an act and a reference to an act includes a reference to such refusal; failure or delay.

4. (1) The provisions of the Act shall have effect only -

- (a) in relation to, or in relation to the doing of acts under a law of the Commonwealth or of a Territory;
- (b) in relation to the doing of acts by or on behalf of the Commonwealth or an authority or body established for a public purpose by or under a law of the Commonwealth or of a Territory; and
- (c) in and in relation to a Territory or a place with respect to which the Parliament, by virtue of Section 52 of the Constitution has, subject to the Constitution, exclusive power to make laws for the peace, order and good government of the Commonwealth.

(2) This Act extends to every external Territory.

5. (1) This Act binds the Commonwealth but not any State.

(2) Subject to sub-section (3), any provision of a law of the Commonwealth or of a Territory, whether passed or made before, on or after the commencing day, that is inconsistent with a provision of this Act does not, to the extent of the inconsistency, have any force or effect.

(3) Sub-section (2) does not apply in relation to a provision of a law if an Act expressly declares that that provision shall operate notwithstanding this Act.

(4) The rights and freedoms set out in this Act are in addition to, and not in derogation of, any other rights and freedoms of the individual, whether under the laws of the Commonwealth, of the States or of the Territories and this Act is not intended to exclude or limit the operation of any of those laws in so far as they can operate concurrently with the provisions of this Act.

(5) Nothing in this Act may be interpreted as implying any right to engage in any activity or perform any act that is restrictive of any of the rights and freedoms recognised in this Act or limits any of those rights and freedoms to a greater extent than is provided for in this Act.

6. Approval is given to ratification by the Commonwealth of the International Covenant on Civil and Political Rights and the Convention on the Political Rights of Women.

1. (1) A person aggrieved by an act that he considers to be a contravention of a human right may institute a proceeding against the person who did the act by way of a civil action in the Federal Court of Australia for a declaration that the act is a contravention of a human right and for any one or more of the remedies specified in sub-section (2).

(2) Where, in a proceeding instituted under sub-section (1), it is established to the reasonable satisfaction of the Court that the defendant has done an act (in this sub-section referred to as the "relevant act") that is a contravention of a human right, the Court shall make a declaration to that effect and may grant all or any of the following remedies:-

(a) an injunction restraining the defendant from repeating the relevant act or from doing an act of a similar kind or from causing or permitting others to do acts of the same or a similar kind;

(b) an order directing the defendant to do a specified act, being an act directed to -

(i) placing a person aggrieved by the relevant act as nearly as practicable in the position in which he would be if the relevant act had not been done; or

(ii) otherwise avoiding a detriment to such a person resulting from the doing of the relevant act;

(c) if the doing of the relevant act resulted in the making of a contract or the relevant act was done in pursuance of a contract - an order cancelling the contract, varying any of the terms of the contract or requiring the repayment, in whole or in part, of an amount paid in pursuance of the contract;

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THE SCHEDULE

Article 1

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained.

Article 2

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 3

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this article the term "forced or compulsory labour" shall not include:
 - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 4 of this Schedule or during conditional release from such detention;
 - (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
 - (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
 - (d) any work or service which forms part of normal civic obligations.

Article 4

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the lawful detention of a person after conviction of a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(d) damages against the defendant in respect of -

- (i) loss suffered by a person aggrieved by the relevant act, including loss of any benefit that the person might reasonably have been expected to obtain if the relevant act had not been done; and
- (ii) loss of dignity, humiliation and injury to the feelings of a person aggrieved by the relevant act;
- (e) an order setting aside or varying a judgment given in any court;
- (f) an order quashing a conviction imposed by any court;
- (g) an order directing a new trial in a civil or criminal proceeding in any court;
- (h) such other relief as the Court thinks just, including an award of costs.

(3) Where a person is of the opinion that another person is about to do an act that would be a contravention of a human right, being an act by which the first-mentioned person would be aggrieved, the first-mentioned person may institute a proceeding against the other person by way of a civil action in the Federal Court of Australia for a declaration that the act would be a contravention of a human right and for all or any of the remedies specified in sub-section (2).

(4) Where, in a proceeding instituted under sub-section (3), it is established to the reasonable satisfaction of the Court that the defendant is about to do an act that would be a contravention of a human right, the Court shall make a declaration to that effect and may grant all or any of the following remedies:-

- (a) an injunction restraining the defendant from doing the act or from doing an act of a similar kind or from causing or permitting others to do acts of the same or a similar kind, and
 - (b) such other relief as the Court thinks just, including an award of costs.
15. (1) Jurisdiction is conferred on the Federal Court of Australia to hear and determine civil proceedings instituted in that Court under this Act and that jurisdiction is exclusive of the jurisdiction of any other court, other than the jurisdiction of the High Court under section 75 of the Constitution.
- (2) Sub-section (1) does not deprive a court of jurisdiction in a matter arising under this Act in a proceeding instituted in that court otherwise than under this Act.

(3) The jurisdiction of the Federal Court of Australia under this section may be exercised by a single judge.

- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 5

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;

- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 6

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 7

Everyone has the right to respect for his private and family life, his home and his correspondence.

Article 8

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Article 9

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

Article 10

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

Article 11

Men and women of marriageable age have the right to marry and to found a family.

Article 19

No one shall be expelled, by means either of an individual or of a collective measure, from the territory of which he is a national.

No one shall be deprived of the right to enter the territory of which he is a national.

Article 20

Collective expulsion of aliens is prohibited.

Article 12

Everyone whose rights and freedoms as set forth in this schedule are violated shall have an effective remedy before a court notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 13

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 15

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the Commonwealth shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 16

The Commonwealth shall hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Article 17

No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

Article 18

Everyone lawfully within the territory of the Commonwealth shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

Everyone shall be free to leave the Commonwealth.

No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security for the prevention of crime, for the protection of health or for the protection of the rights and freedoms of others.