Key Consultation Questions

- **Which human rights and responsibilities should be protected and promoted?**
- **Are human rights sufficiently protected and promoted?**
- **How could Australia better protect and promote human rights?**

35 Woolrych Crescent,
Davidson NSW 2085

Dear Committee Members,

1. Government determined rights?

Given the Key Consultation Questions above, my first and over-riding concern is that the interpretation, application and indeed, perhaps even the experience of "human rights" (whatever the phrase is ultimately determined to mean) will be something very much mediated and administered by Government. As such, this process will have failed if it results in the Commonwealth spending millions of dollars deluging people with glossy brochures and interrupting our favourite televisions programs with cheesy advertisements and corny jingles about the 'values' we allegedly share in common.

Rights will only begin to mean something when we are prepared to have a conversation about things which we wish to put beyond the realm of government, and fight for both an individual and private sphere of our lives where we say that official intrusion of any form is unwelcome. In my view, this is a space where individuals are allowed (without being required to seek permission) to make bad, or supposedly poor, choices in their lives, while also voluntarily assuming the risk for the potentially negative outcomes of their decisions. The most obvious examples here are footballers and other alleged "sports stars" or "heroes". The media's fixation on periodic drunk or violent transgressions, causing sports administrators, commentators and others to enter an 'auction of respectability and responsibility' (much like the rhetoric of the 'Law and Order' campaign of any State election) only puts into stark relief the near puritanical standards some will impose on supposed public figures, while the rest of us anonymously retire to our lounge chair with a beer.

Equally, if we decline to have government define our rights, then it will be harder for governments at all levels to define responsibilities. There are many areas in which I don't want government to have any role in telling me how to run my life. And, if you want proof of how insidious some country's official ordinances can be, just look at Singapore. The former English Governor of Hong Kong Chris Patten made the point in his television documentary *East and West* that the supposedly much admired 'Asian values' were by no means homogeneous, honourable or democratic. He highlighted Singapore as a successful Confucian society and economy, which nonetheless was a virtual one party State where it was an offence to forget to flush the toilet and where citizens were constantly extolled by public education campaigns to "be polite". I distinctly remember Mr Patten commenting how he could not sit through a full hour of a State-enforced politeness lesson in a Singaporean theatre

Sadly, but inexorably, all western democracies, including Australia, appear to be heading in the same direction. Little by little, Federal, State and local governments are seeking to licence, prohibit or otherwise administer every individual's life and our associations. On a personal level, I have had experience as secretary of a local community sports facility. The local Council insisted that if we wanted to run fundraising dinners, raffles and the like, we had to apply for a fundraising licence from the NSW Department of Gaming and Racing. The application form not only required full copies of the organisation's constitution, copies of minutes and a mailing address, but also every member of the Executive had to provide their name, private address, date of birth *and* place of birth. For all this, we were generously given a two-year licence. And for what; most of the people who were going to support the facility were families involved in the sporting clubs who used the facility. Did we really have to prove our bona fides to them?

2. From peace to protection?

Departmental officials and council officers would probably say licensing was a means of 'protecting the community' from fraud. But are governments really the bodies we want to rely on to 'protect us'? We only have to look at the current international financial crisis to see how few of our political and administrative leaders either predicted the collapse, or were immediately sure of the appropriate response. Multiple stimulus packages and international meetings later, millions around the globe are still set to lose their jobs and homes. This retelling of what many already know is not intended to depress you, but to rather underline the impotence of government in so many situations.

And is this really the role of government anyway? Section 51 of the Commonwealth Constitution speaks in terms of the provision of 'peace, order and good government'[1] and while there are other sections referring to pensions and benefits, I suggest that many of our Founders would struggle to comprehend many legal developments of the modern day. And I am not making the old States Rights argument about the centralisation of power in Canberra; rather, it is a question of a notable change of focus of regulators and politicians. From peace, order and good government we have moved to protection, obedience and good behaviour.

In this respect, as someone with a physical disability, I have at many times in my life found myself being case managed to within an inch of insanity. For example, while it might have been very generous of the taxpayer to partially fund my transport expenses while undertaking undergraduate study, via the Commonwealth Rehabilitation Service (CRS), the level of influence this gave CRS caseworkers over the nature and direction of my studies was incredible. At one point CRS raised queries over my subject selection 24 hours before I was to enrol, while on another occasion a case officer insisted that I produce a full subject plan covering the entire life of my undergraduate study. The document was produced, but I contacted the Dean of Students who advised it was unrealistic to plan so far ahead; the University could not guarantee staff and subject availability, beyond what was offered that year. I requested that she put that in writing to the CRS.

[1] And the State Constitutions would use similar language

While, on one level, these problems are minor and were ultimately resolved, they demonstrate how willing government is to intervene in the day to day life of individual citizens. In my submission to the Productivity Commission's inquiry into paid maternity leave,[2] I tried to outline how intrusive and indeed, oppressive, many of these interventions (supposedly for the recipient's benefit) can be. I was aided by Peter J Crawford, former senior public servant, who showed in his book *Captive of the System* how government guidelines and regulations had proliferated.[3] He went on to demonstrate how this often causes the needy to abandon government service providers in frustration and confusion, turning to the charitable sector instead.[4]

Government is often left unaccountable for these outcomes, because an increasing amount of bureaucratic decision making is conducted under the guise of legally unenforceable, but equally unreviewable guidelines. Few of these documents ever see a Parliamentary Table, yet they regularly affect the public's access to goods, services and information from a range of official agencies, as well as private sector bodies hired by the State for various ends. Again, if the Federal Government really wants to do something about promoting the human rights of Australians, it should move to ban the use by agencies of guidelines and any other similar documents which never receive proper Parliamentary scrutiny. As Victorian Attorney General Rob Hulls told the Commemorative Sitting of the High Court in 2003:

"…In our defence of the rule of the law, we must also be alert to, and alarmed by, attempts to bypass judicial scrutiny, whether it be via privative clauses or the more insidious trend towards unenforceable guidelines. In my view, any suggestion that an Executive's "non-binding guidelines" be accepted as authoritative is dangerous terrain. Yet it is increasingly the case that we are asked the accept the legitimacy of such guidelines, whether it be in Industrial Relations, decisions concerning grants of Legal Aid, or more poignantly in the immigration area…"[5]

Mr Hulls is right. We should not accept as legitimate or authoritative agency guidelines. These should be banned, or tabled in Parliament as subordinate legislation. Additionally, all legislation except the Constitution and the *Acts Interpretation Act* should be declared to have an automatic sunset clause, of say five or (at most) ten years. This would put in place a continual enforced review (and hopefully a cull) of both agencies and statutes. It would be beneficial to see everyone from ASIO to the Treasury forced to publicly justify their continued existence, as well as account for what they were doing before a Parliamentary hearing. After all, while electors may periodically change governments, and the politicians who temporarily lead them regularly change senior departmental staff

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[2] *See* http://www.pc.gov.au/__data/assets/pdf_file/0018/80442/sub063.pdf
[3] *See* reference at ibid, pp. 5-6
[4] Refer to Sydney Morning Herald article cited at ibid, p.5
[5] The Hon. Rob Hulls MP, *Ceremonial - Special Sitting at Melbourne - Centenary of High Court of Australia [2003]* HCATrans 406 (6 October 2003) Last Updated: 25 November 2003, [2003] HCATrans 406, http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/HCATrans/2003/406.html?query=%5e+high+court+centenary

and what parts of what agency report to one or other Minister, the bureaucracy itself remains. As a result, certain questions are never asked. These include:

- Does the original purpose for this agency's existence still warrant official attention?
- Would it really matter if this agency ceased to exist?
- Is there a private sector provider capable of providing a similar service? If so, what is the rationale for continued government involvement?
- Is continued government involvement inhibiting the development or growth of alternative service providers?[6]

Again, as I said in my opening remarks, rights will only mean something when we are prepared to put certain aspects of our lives and values beyond the State's control. To do this, individually and collectively, Australians must be prepared to limit government. This means instead of saying "X" is a problem therefore "the government should do something about it", we should consider that while X may well be a problem, government intervention will potentially leave X + unintended consequences. Equally, handing a problem, whether major or minor, over to government necessarily means a loss of liberty or freedom to choose. Again, from my own experience of disability, some alleged service providers can be both demanding and presumptive. While the term "client" or "customer" is used in modern bureaucratic language, vassal might be a more apt phrase. Here again, an example used when writing to the Government's Taxation Review[7] is relevant here. It relates to experiences with some employment services. In particular, I repeat a pertinent section from that submission's Appendix here:

"…Some (employment) agencies will call you into meetings, saying they have a 'special arrangement' with a potential employer. (In my case the) agency with the supposed special relationship was Disability Works Australia (DWA) and the employer was the ACT Government. This relationship was so special that the ACT Government 'suspended' its Graduate Program. I complained to my employment agent, the ACT Government and the Federal Minister for Workforce Participation Dr Sharman Stone MP. Her Department advised that:

"…In increasing the employment opportunities for people with disability DWA enters into Memoranda of Understanding (MOUs) with employers. The MOUs are designed to articulate the available services required by each employer to assist them hire people with disability. Legal contracts are not used because it would be unlikely that employers would risk facing penalty in the case that they had to defer or stop a recruitment process.

It is important that employers are not discouraged from seeking to employ people with disability by requiring them to be penalized if their fluctuating business concerns cause

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[6] For an interesting discussion on the problems which necessarily result from ongoing growth of government and it responsibilities, see *The Non-Issue that Should Be an Issue* - Mises Daily by Gregory Bresiger | Posted on 7/3/2008 12:00:00 AM at http://mises.org/story/3020 While it comes from a US perspective, Australian politicians of all persuasions are just as ready as any US candidate to make promises about "what the government will do" if they are elected. Where will the growth end, can we afford it and, how many liberties are we losing in calling for more and more government action?

[7] *See* http://taxreview.treasury.gov.au/content/submissions/Adam_Johnston.pdf

them to cease a planned recruitment process. When an employer places a job vacancy into the public domain there is always the risk that the employer's will change and that the recruitment may have to be deferred or stopped…"

While the Department's position is understandable to a point, there are several questions which need to be raised. The first is what preparatory investigations did DWA make to satisfy itself that the arrangement it had with the ACT Government was more than likely to be completed? Secondly, if the agency failed to make reasonable inquiries as to the bona fides of parties signing MOUs, why shouldn't it be held legally accountable for such failures? After all, there is much public money at stake…"[8]

My other main point in writing that submission was to underline my dissatisfaction with the process from an individual perspective. As someone who was unemployed at the time, I knew I could be financially penalised for not attending meetings or interviews. Yet, while one party is obliged, others can freely operate under unenforceable MOUs without fear of sanction. Fortunately for me, my principal agent agreed in many instances to cover some of my out of pocket expenses, largely comprising of taxi fares to and from various appointments. However, those less forthright than me would, in many instances, find themselves seriously out of pocket.

Therefore, the principle of comity should apply not only between governments, but between the individual and the State. If the State is obliging you to do something (e.g.: attend a job interview) it should be equally bound to act in good faith, and be accountable for when it fails to deliver. In this light, MOUs that are not enforceable do not pass this test, because as my case demonstrated, I was called to appointments about work opportunities which did not ultimately exist. It is ironic that Attorney General McClelland has insisted that this human rights consultation process not undermine the sovereignty of Parliament by, for example, proposing a Bill of Rights. However, the Parliament routinely undermines its own sovereignty when it allows Executive agencies to structure their business around procedures, protocols, codes and guidelines which are not vetted by the Legislature.

3. Accountability

There are several ways to address this problem. The first is to declare that if there is to be one absolute and inviolable human right declared in Australia, it is that all citizens have a right to know what their government is doing. Therefore, the Parliament should ratify all agency guidelines, while the Executive should (in all jurisdictions):

- Divest itself of all legal professional privilege when it is a party in either civil or criminal proceedings.
- Divest itself of copyright in government documents, declaring them to be the common property of the people of Australia.[9]

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[8] Ibid., pp. 6-7 (Adobe Reader numbering)

[9] See my letter to *About the House* magazine – "Less Laws Protect Freedoms" – available at http://www.aph.gov.au/House/house_news/magazine/ATH33.pdf (page 4)

- Declare that no government contact can lawfully contain 'commercial in confidence' provisions. All contracts should be open to public scrutiny, as it is taxpayers' money being spent and we should be assured that all monies are spent in the public interest. Such steps are reasonable, given the view of former NSW Auditor General Tony Harris that "major contracts have hundreds of contract lawyers and business advisers involved in them and the capacity to keep provisions secret is highly doubtful".[10] If this is the case, why keep these matters secret in the first place?
- Move towards placing more and more information online, with the objective of making the citizen's interaction with government streamlined, electronic and with minimal need to directly deal with any departmental officers directly. However, if individuals are going to have the power and autonomy to quickly resolve more of their problems with government on-line, the information people require when lodging their complaints, objections or appeals needs to be on-line and readily available. Administrative decision makers also need to have all relevant information in front of them on-line, along with the capacity and preparedness to make decisions in that environment. As Georg Jakob from the University of Salzburg wrote in 2002 that:

> "…(While) the most important aspect is that the (administrative) decision itself to either reject or fulfill a citizens request should be entirely left to the human representative of the authority. Since the extensive (re)use of templates in legal decisions is a phenomenon not unique to electronic offices, such a system might even have the improving effect of rendering administrative decisions more human by enabling officers to concentrate on the most important part of their work - getting a personal impression of all aspects relevant to the case and deciding it accordingly.
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> This is where the most positive aspect of stripping down the officers' workload to its essence might be gained. Getting the citizen more involved in procedure, obliging him to provide those informations furthering his interests, assigning him a more responsible role leaves more room for the officer to do the actual legal evaluation. If different offices are connected via internal messaging systems or discussion boards, brainstorming sessions on a regular basis could be held and the expertise of officers furthered at a relatively low additional cost. Together, these measures might indeed be able to further justice…"[11]

It is the opportunity for individuals to have more autonomy in their lives, as well as the compulsion on government to be more open which draws me to the concept of e-government. Also, my experience of dealing with large organisations (government or not) on-line, is that they design their web pages and portals for their convenience, not

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[10] Senate Finance and Public Administration References Committee, *Inquiry Into The Mechanism For Providing Accountability To The Senate In Relation To Government Contracts*, The Parliament of the Commonwealth of Australia, June 2000, p.28

[11] Jacob, Georg (University of Salzburg, Department for Law and Informatics), *Electronic Government: Perspectives and Pitfalls of Online Administrative Procedure*, Proceedings of the 36th Hawaii International Conference on System Sciences (HICSS'03), 0-7695-1874-5/03 $17.00 © 2002 IEEE, available at http://www.hicss.hawaii.edu/HICSS36/HICSSpapers/ETEPO02.pdf (pages 8-9 Adobe numbering)

necessarily that of the customer In order to address concerns about privacy in an e-government environment, reform the tax system is essential. Raising minimum thresholds and unifying the company and personal tax rates, while abolishing most deductions. This has the general aim of stopping the churn of tax and transfer between the same people, while also excusing many citizens from putting in a tax return in the first place. This is the view I have put to the Government's Taxation Review.[12]

Ultimately however, governments can change systems or procedures indefinitely. The real question is how and why they do this? All too often it is to control or modify how individuals behave and interact with each other. To an extent, if it is for general peace and order, this is tolerable. However, when a case manager tries to micro-manage your life because you are eligible for a state-run service (which you may or may not want, but may at various times be obliged to access), one begins to notice a subtle change in the nature of government. From institutions that could once build a Snowy Scheme, we now have to call in private toll road builders. Meanwhile, as someone with a disability, whenever I deal with government, I keep bumping into social workers, counsellors, consultants and other agents of welfare. While welfare has its place, it is to be wondered just how far this has gone and whether, over time, we have failed to see the change? Many things that were once personal and private are now "case managed" by government. Simultaneously, many of the things we used to look to government for (e.g.: infrastructure) are now the province of the private sector. This has to be a significant, historic change. But when did a Parliament ever debate such a question?

I do not think any such debate has occurred, but its importance came home to me when reading this by English academic A. C. Grayling:

> "…In its defence (of anti-terrorism laws) the British government, in line with several other European governments, claims that its highest duty is the security of the public. This is false. The security of the public is certainly a high duty of government; but it is not the highest one. Its highest duty is the protection of individual liberties…"[13]

A statement about government's true highest duty should appear in any document that this process produces. In any event, we appear to have largely forgotten the value of liberty, or even what the phrase really means. Looking to the back of Grayling's book, I found an Appendix containing the English *Bill of Rights 1689,* a document received as part of our law when Captain Cook took possession of Australian in 1770.

This caused me to reflect on an experience as a delegate to the 1998 Constitutional Convention on whether Australia became a republic. Having prepared my own model for a republic, I wrote it in the form of a Parliamentary Bill and also deliberately inserted sections of the 1689 Act. Retaining the old English was, in my view, a suitable and necessary salute to our history and those who had lived in a much more perilous, non-democratic time. On receiving the document though, the Convention Secretariat asked

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[12] *See* footnote 7, above

[13] Grayling, AC, *Towards the Light – The Story of the Struggle for Liberty and Rights that made the Modern West,* Bloomsbury Publishing, Great Britain, p.269

me whether I was aware of all the "spelling errors" it included! We have indeed forgotten much.

This is another reason for nervousness about any discussion of human rights. Some will bring knowledge of history, while others will bring a range of contemporary concerns like the environment. The latter may be legitimate, but my sense of human rights concerns matters both more personal and enduring. For example, in a recent review of the Disability Discrimination Act, I suggested that the legislation did not really meet the aspirations of many, including me. Acknowledging experience like disability might be kind and even noble, but it normalises a degree of human suffering and distress. To me, an anti-discrimination (or positive rights framework) which enshrines an acceptance of long term infirmity or disability is perverse. As I told the Senate in my submission:

"…As someone confined to a wheelchair by cerebral palsy I acknowledge that one can see vast changes over the 35 years of my own life. And it is not that I fail to welcome the clear progress that has been made. However, it is also fair to say that having sat on numerous access committees and lobbied government (at all levels) repeatedly, this is not something I want to be doing in 20 years from now. By then, I want to live in a world which says that it is discriminatory, as well as being a failure of medicine, science and public policy, for anyone to be living with any form of disability. If some people like Bono and Sir Bob Geldof believe they can make poverty and hunger history, why do we not aim to do the same with disability?..."[14]

4. Individual liberty and progress

Human rights should serve individual liberty and human progress. In this respect, it is sad that "progress" is often seen so negatively in the modern day. Look at the science fiction of the 1960s or 70s and see the unfulfilled predictions of Moon and Martian colonies, as well as robots which would do all the chores. Indeed, look to Star Trek IV, when Dr McCoy was confronted with a 1980s hospital and a patient requiring dialysis, he exclaimed "My God! What is this – the Dark Ages?" This struck such a cord with me that I used it in the opening of a submission to the Senate on stem cell research.[15]

Equally, the influence of the Christian Church (regardless of denomination) is troubling. No doubt the churches will have a fair bit to say in this consultation, as they did during the stem cell debate. As such, I would urge Father Brennan (regardless of his personal convictions) to do what he can to give the churches a hearing, but in the interest of all Australians, keep them at arms length during the process and when formulating the final outcome. As legal academic Dr Helen Irving has written, Edmund Barton, our first Prime Minister, stated that Australia's "whole mode of government, the whole province

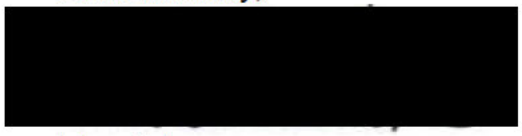
[14] *See https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=52150cdb-cecf-4337-bb59-17c1497066c9* (pp. 1-2)
[15] *See http://www.aph.gov.au/senate/committee/clac_ctte/completed_inquiries/2004-07/leg_response_lockhart_review/submissions/sub53.pdf* (p.1)

of the State, is secular".[16] The impact of the Barton's words not being heeded came home to me when St. John's College agreed in 2007 to give Sydney University some land to build a medical research centre, on condition that researchers would not conduct stem cell research. Outraged, I wrote to the Sydney Morning Herald and prepared a paper,[17] concluding in short, that research ethical guidelines and the by-laws of all-too-accommodating University Councils could be just as insidious as other (unreviewable) guidelines. Again, these bodies of higher learning should not have autonomy and their by-laws should be regularly subject to Parliamentary review.

5. Conclusion

The Committee should consider that human rights will only be advanced when governments are more effectively restrained. Their operations must be more transparent and removing legal privilege and other protections from the Crown will assist in this aim, as well as requiring agencies to table guidelines and other similar instruments in Parliament. Formally declaring that the State is secular and that its highest duty is the protection of the individual's liberty *and not* the individual's person would also be welcome.

Yours faithfully,



Adam Johnston

Friday, 10 April 2009 4:04 PM

[16] Irving, Helen, *Australia's foundations were definitely and deliberately not Christian,* Sydney Morning Herald, 3 June 2004, available at http://www.onlineopinion.com.au/view.asp?article=2272

[17] *See* Appendix 1