Submission to the National Human Rights Consultation
by Sir James Gobbo

1. The starting point for those seeking to add a Bill of Rights or Charter of Rights is to point to actual examples of injustices or wrongs or grievances which cry out for relief, which cannot be addressed under existing law or other remedies. The current debate is essentially about wrongs within Australia and does not focus on issues of human rights in relation to asylum seekers. This is an important issue which deserves separate consideration.

2. The existing remedies for wrongs and grievances can be summarised as follows:
   a. The Common Law;
   b. The Constitution;
   c. Statute Law, including specific legislation, such as Racial or Sex Discrimination or Equal Opportunity Acts;
   d. Recourse to extra-legal remedies, sometimes set up by Statute such as the Ombudsman Scheme or by industry itself, such as the many industry or Services Ombudsman Schemes. I set these out below;
   e. Recourse to the providers of services or goods;
   f. Recourse to consumer and voluntary community organisations; and
   g. Recourse to political representation.

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1 The phrase “Making Democracy Work” was the title of Princeton Professor Robert Putnam’s book on civic traditions in Italy in the 1970s and the essential conditions for successful democracy.
2 I set out below some of my personal history, which is relevant to the matters I put forward in this Submission.

- My parents were Italian migrants and I spent part of my childhood in Italy.
- My practice as a barrister included habeas corpus applications and Local Government issues. I held a retainer as Counsel for the Victorian Ombudsman, then Sir John Dillon.
- During my 16 years as a Supreme Court Judge, I sat in all jurisdictions of that Court and both as a Trial Judge and in Appeals.
- Since 1975, I have been heavily involved in immigration policy issues, multicultural affairs and Italian Community affairs. In particular, I was the Chair of the Refugee Council, the founding Chair of the Council for Multicultural Affairs in 1989 and of the Australian Multicultural Foundation, both in 1989.
- On retiring from the Court in 1994, I became Chairman of the Banking Industry Ombudsman Council and soon after, Chair of the Electricity Ombudsman Council.
The list is not exhaustive but its width shows the existing ambit of what may fairly be described as the workings of democracy.

3. I refer first to the Industry Ombudsman Schemes, the first of which was in the Banking Industry where I succeeded Sir Ninian Stephen as Chair. This Scheme covered all banks and later also providers of financial services. The Right not to be deprived wrongly of a financial service is fundamental to the wellbeing of citizens and their capacity to enjoy a whole plethora of other rights.

There are now a wide variety of industry Ombudsman Schemes which afford prompt and free relief to persons aggrieved by unfair conduct by suppliers of products or services. To these should be added other non-Court Alternative Dispute Resolution Schemes. The width and variety of these Schemes – which, together with the Government Ombudsman Schemes, handle some 500,000 cases per year – are evident from the following Table covering Schemes in Victoria:

- AAMI Consumer Appeals Ombudsman
- Accident Compensation Conciliation Service
- Banking and Financial Services Ombudsman
- Telecommunications Industry Ombudsman
- Financial Industry Complaints Service
- Energy and Water Ombudsman (Victoria)
- Public Transport Ombudsman
- Health Services Commissioner
- Victorian Small Business Commissioner
- Dispute Settlement Centre Victoria
- Ombudsman Victoria
- Victoria Legal Aid
- Victorian Privacy Commissioner

[Source: Alternative Dispute Resolution: Supplier Survey 2006, Department of Justice, Victoria]
4. Particular reference should be to the Government Ombudsman Schemes. I first refer, for example, to the Commonwealth Ombudsman Scheme. His Annual Report for 2007-2008 lists the following categories of cases, many of which are frequently said to involve “human rights”.

- Surveillance devices
- Telecommunications records
- Immigration
- Law Enforcement
- Indigenous Issues
- Maladministration
- Corruption
- Freedom of Information

5. Both the Industry Ombudsman Schemes and the Ombudsman Offices created by Statute in every State and Territory address a multitude of important issues which have a direct and immediate bearing on the lives of citizens. So, for example, to lose one’s credit facilities can be critical, as is true of those suffering deprivation of services, whether power, water, telecommunications or other services which are supervised by the authorities set out in paragraphs 2 and 3. These authorities deal with hundreds of thousands of grievances and complaints, expeditiously and invariably, free of charge.

6. By comparison, the proponents of a Federal Charter seldom list examples of injustice or unanswered complaints which demonstrate the need for a Charter. Rather, they claim that the past record of the operation of other Charters, in particular the UK Human Rights Act and the Victorian Charter of Human Rights and Responsibilities, shows the value of a Charter or like legislation.

As to the UK Human Rights Act, it is interesting to peruse the UK Human Rights Report published in 2008 to celebrate 10 years of the Act. This Report adds 16 new case studies to the original 15 case studies in its earlier report. These cases do not demonstrate that the UK Act made possible an intervention and a beneficial result that was not otherwise available. At best, the case studies generally show that when unjust or unfair situations are pressed or brought to the notice of those in authority, the latter often, if not invariably, respond positively. The Report

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does not address the fact that most, if not all, of the cases described could have been resolved by resort to existing legal or political remedies.

Many of the cases relied upon in the UK Report as examples of the success of the UK Human Rights Act relate to health. In this area, where poor treatment or neglect has occurred, it has been due to two main causes:

- Failure by the health service in question to perform its obligations under existing legislation, whether statute or regulation;
- Failure by Government to provide sufficient staff or funds.

Neither situation is assisted by a Federal Charter. There are already existing remedies as to poor treatment or neglect which traverse a series of possible steps, including complaint procedures set up as a health accreditation requirement, independent statutory watchdogs and consumer organisations.

7. My own experience of governance in health care bodies is that the most effective way of meeting grievances and complaints is by reliance on the dedication and commitment of staff – both those engaged in direct service delivery and in administration. To these should be added the not insignificant role of Boards and volunteers. When I was on hospital boards, we took a keen interest in this area and we requested and were supplied with actual letters of all complaints and grievances. There is also now available a comprehensive source of remedy through Health Commissioners. To this should be added the voluntary sector in its many forms, including the now considerable spread of culturally diverse bodies serving their communities. All these provide a much more practical and experienced resource than a Charter, not only in health but in other areas.

8. Turning from the UK Act to the Victorian Charter of Human Rights and Responsibilities of 2006, it is submitted that no case can be made that actual case study experience of that Charter proves the benefits have been provided by it that were not already available.

At the Consultation on 14 April 2009 at the Windsor Hotel, Melbourne, the Hon Rob Hulls, Attorney-General, spoke on the Victorian Charter. During his interesting speech, he said that there was no right in the Charter which was new or not found already in existing law. Assuming this is so, why not enforce the existing law rather than creating a new and somewhat vague one?
Nonetheless, it has been claimed in submissions that the Victorian Charter provides relief not otherwise available. Certainly, advocates of a Federal Charter rely on the record of existing Charters in the UK, Victoria and ACT as supporting their case.

It is interesting to peruse the Annual Report 2008 of the Victorian Equal Opportunity and Human Rights Commission. There are only five case studies put forward as examples of the role of the Charter in providing relief. The first is at page 62 and is entitled, "Access to health care for an older woman". It is narrated that her advocates argued to the health authority that failure to provide her with the treatment she required was "incompatible with her human rights." "Her advocates were able to obtain one-off funding for urgent treatment, while other options for a longer term support package were explored."

This kind of result is achieved frequently by family members, social workers, doctors, nurses and charitable organisations. It adds nothing to say the patient in question has a human right to proper care. It indeed may obscure the fact that there is often a legal liability to provide proper care and it may be a distraction from focussing on existing obligations — whether contractual, statutory, moral or otherwise.

The same considerations are true of the case study at page 65. The other three case studies are examples of good advocacy, which would have prevailed anyway without any reference to human rights. The cases relied upon do not demonstrate that the Charter gave a relief that would not otherwise have been available if all appropriate steps, including good advocacy had been exercised.

9. Again, as to the Victorian Charter, it is also useful to consider the Annual Report of the Victorian Ombudsman, who has part responsibility in connection with that Charter. The section on Human Rights in his Report is on pages 31-33. There are three case studies set out.

The first relates to conditions inside a prisoner transport vehicle, which caused distress to a prisoner. This came to the Ombudsman's notice not because of the Charter but because since its inception, the Victorian Ombudsman's Act has required any complaint in writing by a prisoner to be sent unopened to the Ombudsman. When I was at the Bar, I was involved as counsel for the Ombudsman in some matters following such complaints. There was never any suggestion of recourse to a human rights argument in securing effective intervention by the
Victorian Ombudsman. The same is no doubt true today for the Charter adds nothing to the weight of the Ombudsman’s powers.

Recently, a Supreme Court Judge directed the Prison Authorities on a similar issue in a terrorism trial. There was no reference to the Charter or Human Rights. Any Judge would say it would be otiose. A Judge has wide inherent powers to secure a fair trial without recourse to “human rights” or a Charter.

The same considerations apply to the case study on an allegation of excessive use of force on page 32 of the Report. Similar considerations apply to the third and final case study about visiting rights. In my time as counsel for the Ombudsman, he intervened regularly on these matters. A Charter would have added nothing to his ability to intervene and to the weight of his intervention.

10. The ultimate aim of any Democracy must surely be to “make democracy work”. Democracy works best when ordinary people without deep pockets can resort to and use clear and well tried avenues for relief.

As already discussed, the most obvious port of call for complainants is the provider of the product or service. If this fails, a valuable vehicle for assistance is the local Parliamentary representative, be it Federal or State or the local council. This is after all the most evident face of democracy for these are the democratically elected representatives of the citizens.

It is absurd to set up a widely phrased Human Rights Charter suggesting to the public at large that it is a panacea for all ills or unfairness. All the more is this so if it distracts the public from resorting to more logical means of redress. The absurdity is compounded if there is any proposal to set up new agencies and bureaucracies and enforcement or information offices encouraging the public to resort to them with their complaints.

This not only fails to make democracy work – it is capable of diminishing it by by-passing Parliamentarians and Local Councillors.

is more informative and less high-blown that its Victorian equivalent in that it rarely claims or infers that but for the Act, the interventions and resolutions of complaints referred to would not have occurred.

The largest number of complaints were – as was the case in the UK – in the health area. But “human rights” could scarcely be credited with any progress since Health was already covered by the Community and Health Services Complaints Commission, which was brought within the area of Human Rights Commission. Examination of the case studies published – see page 17 ff – show that these cases had little to do with human rights as a source of relief but rather related to the enforcement of proper operating standards for health facilities. The Report at page 13 notes:

*The Commission has sought to encourage complainants to seek redress in the first instance with service providers, where the Commission is satisfied that those service providers have adequate internal complaint handling processes in place. In this way complainants may often obtain earlier resolution of their complaints and more personalised outcomes than through the Commission’s processes.*

It is therefore submitted that the ACT Human Rights Commission’s own Report does not demonstrate that the past operation of the ACT Human Rights Act supports a Federal Charter.

12. It may be urged that the UK Human Rights Act and the Victorian and ACT Charters have still been worthwhile anyway because of the general education of the public, and of authorities. This is a reasonable view but the short answer is that the funds expended on this would be better spent in advising the public of the conventional remedies available to them – whether in existing Statutes or otherwise. This is especially the case with Ombudsman Schemes, the Complaints and Consumer Bodies, which are practical and usually at the work face. Besides, they are in existence. They are a better option than creating new Human Rights bureaucracies designed to find and service potential complainants.

13. May I draw on my experience in the area of Multicultural Affairs in support of the argument against a Charter. It is often acknowledged by overseas experts, as well as being widely recognised here, that Australia has made a success of the way its considerable cultural diversity has developed.
This achievement was no accident; it was the result of years of debate which eventually resulted in the National Agenda. This was the work of the Australian Council of Multicultural Affairs, set up by Prime Minister Bob Hawke in 1989. I was the Council’s Chairman and Peter Shergold its Executive Director. The Council’s Report in essence sets out the principles for effective multiculturalism and recommended policies to be put in place, especially by Government Departments. This Council and its successors monitored how these policies were implemented. We advised against any policies of affirmative action – save for the special case of our indigenous people. We were specifically asked whether there should be a Multiculturalism Act; we advised against it. This latter subject does not appear in the National Agenda as it had been reserved for separate and later consideration. In effect, we advised against a Charter or Bill of Rights creating legislation structures and sanctions. We realised that multiculturalism was best nurtured in an incremental way. And so it has proved to be. The lesson is obvious – progress even in contentious areas was best achieved by making the humanity of cultural diversity win over Australia without resort to general legislation.

14. This submission does not address human rights in the refugee and immigration area, which raises questions which are more difficult and complex. Here a stronger case can be made for recourse to human rights spelt out in International Declarations and Treaties. It should be noted that comprehensive Reports of the Human Rights and Equal Opportunity Commission which have been issued in recent years have been very effective and may be more in keeping with Australia’s pragmatic approach than resort to a Charter.

15. There is a danger that many many persons and organisations who have laboured long and hard and successfully to reduce social injustice and misery may feel undervalued by the assumption that because of the absence of a Charter, significant areas of social distress have not been able to be addressed. This is not true and any such inference sells short generations of sacrifice and commitment and success by many, including great organisations like the Salvation Army and St Vincent de Paul to name only a few.