

Wrongs, Rights & Remedies

An Australian Charter?

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Preface

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CHAPTER 1: Children in Detention, the High Court and The Protection of Human Rights

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'No Way Out'

Only a decade and a half ago, it would have been difficult for Australians to imagine that young children, some without their parents, would be detained behind barbed wire fencing in far off outposts of the country, at the behest of the Federal Government and without prospect of release. Yet this is what happened subsequently and it shocked the conscience of many across the nation.

That shock, in turn, has re-ignited discussion about whether the human rights of Australians are any longer adequately protected. And it has rekindled debate about whether Australia should now enact comprehensive legislation to protect such rights. This essay is addressed to those questions.

Before moving to them, however, it is important to understand initially how it was that these children, even though imprisoned and guilty of no offence, could find no remedy either from the parliament or the courts, even though it was clear that their fundamental human rights were being radically infringed.

This matter came to a head in the case of *Re Woolley*, decided in 2004, when the High Court of Australia had to rule on the legal validity of the mandatory detention of the children of asylum-seekers. It concluded that the Commonwealth Government has the legal authority to detain children mandatorily – and even for years. The conclusions of the court were unanimous and, in our view, correct. This is not for a moment, however, to endorse the now abandoned policy of the compulsory imprisonment of children contained in the law that the court was required to consider.

In *Re Woolley*, the question was whether an exception could be made for children in legislation requiring the mandatory detention of people seeking asylum. Mr Woolley was the manager of the Baxter Detention Centre. The applicants were four Afghani children aged 15, 13, 11, and 7 who had arrived with their parents on Australian shores seeking refugee status on the

ground that they would be in danger of persecution if they returned to their homeland.

The High Court held that the *Migration Act* could not be read so as to provide children with a legal or constitutional immunity from mandatory detention. Children stood in no different position from their parents in this respect. The legal reasoning which led to this conclusion was straightforward.

The two central provisions of the *Migration Act* that provided for mandatory detention refer to the detention of 'unlawful non-citizens'. The Act defines an unlawful non-citizen as a person who is not a citizen and does not possess a visa. A child is a person. Therefore, a child may fall within the meaning of the term 'unlawful non-citizen'.

Further, it had to be presumed that parliament would have known that adults and children would have been caught by the definitional provisions. As Justice Kirby observed, the plight of children in detention had been drawn to parliament's attention in several, detailed parliamentary reports and reports from the Australian Human Rights Commission. Despite this, no change to the legislation had been made by the parliament. The governing majority had set its face against any such change.

The Constitution could not help either. It provides the parliament with the power to make laws with respect to aliens (i.e. unlawful non-citizens). The statutory provisions with respect to mandatory detention are laws concerning aliens. They provide for the detention of aliens pending the scrutiny of their asylum claims, and if rejected, pending their deportation.

In short, the plain words of the *Migration Act* provided no room for an implication that the detention regime was inapplicable to children. Given the clarity of the words, and the intention behind them, it was not for the court to undermine the legislature's will. Justice Kirby summarised the position as follows:

“For an Australian court, a refusal to apply, and give effect to provisions of a valid federal act is not an available option. Fundamental to the Australian Constitution is respect for the rule of law. If the law is

clear and constitutionally valid, it is the duty of the Australian courts to apply its terms. This is so whatever judges or others might think about the content and effect of the law.”

The *Migration Act* provided no way out for the court and, consequently, no way out for the children.

This outcome, however well it might have been justified legally, presented the Australian nation and legal system with a formidable dilemma. Australia's incarceration of children, often for long periods of time, had been well recognised internationally and nationally as a grave assault on their human rights. It constituted a significant infringement of Australia's obligations under a number of international human rights conventions including, most notably, the International Convention on the Rights of the Child.

Yet, in the face of the plain intention of the parliament, nothing other than the replacement of the government at election (which in the case of refugee policy at the time amounted to the interchange of Tweedledum with Tweedledee) could be done to rectify or moderate the injury.

This draws our attention sharply to certain critical matters that the High Court, as a matter of law, could *not* take into account when reaching its conclusions. It could not consider whether the scheme of the legislation might be inconsistent with Australia's international human rights treaty obligations. This is because a treaty's provisions require domestic legislation to have effect in Australian law and no relevant legislation had been passed.

It could not consider the consistent opinion of United Nations treaty monitoring bodies and rapporteurs to the effect that Australia was persistently in breach of its treaty obligations: in this case, in breach of its obligation to ensure that no child should be deprived arbitrarily of their liberty and that detention of a child should be used only as a measure of last resort.

It could not consider the powerful, indeed overwhelming, evidence of the systematic abuse of children's rights and the physical and emotional injury inflicted upon them in mandatory detention produced by Australia's Human Rights Commission. In its 900 page report *As a Last Resort* (2004), the Commission concluded that:

“Children in immigration detention suffered from anxiety, distress, bed-wetting, suicidal ideation, and self destructive behaviour including attempted and actual self harm. The methods used by children to self harm included hunger strikes, attempted hanging, slashing, swallowing shampoo or detergents and lip-sewing. Some children were also diagnosed with specific psychiatric illnesses such as depression or post traumatic stress disorder.”¹

The only way in which evidence such as this might have made its way into the court’s legal deliberations would have been if Australia had a constitutionally entrenched or statutory Charter of Rights, incorporating the provisions of the international human rights conventions that it has ratified. But Australia remains the last country in the Western world not to have adopted such a Charter. Neither Australians nor aliens have recourse to a law of this kind.

When reading the Human Rights Commission’s report, one of the authors came close to tears when reading the following series of entries made by staff in relation to one particular 12 year old child. This case study was not isolated but was one of more than a hundred considered by the Commission:

“11 April 2002: Child attempts to hang himself with a bed sheet on playground equipment.

12 April: ... Child recorded as saying: ‘he wanted to kill himself because his mother doesn’t eat and she cries all the time ... Very tired of camp, getting up in the morning and seeing the fences and dirt. We came for support and it seems we’re being tortured. It doesn’t matter where you keep me, I’m going to hang myself.’

19 April: Child attempts to hang himself from playground equipment. Child taken to hospital with his father ...

17 May: Child attempts to hang himself from playground equipment. Taken to Woomera and then returns ...

30 May: Psychiatrist reports that ‘for this child the matter is simple. If he remains in custody he wishes to die. He can no longer bear razor wire

and dirt. He worries about his mother’s wellbeing and also about his father who he says is constantly worrying and angry ...’

7 June: Child found in the razor wire. He says ‘he can’t go on anymore.’

8 June: Child found in razor wire again.

14 June: Child climbs fence into the razor wire a third time. After about 8 minutes climbs down again.

24 June: Child on hunger strike.

13 July: Child found in razor wire.

26 July: Child attempts to hang himself ...”

It is with that and other similar cases in mind that we approach the writing of this monograph.

The National Consultation on Human Rights

Partly in response to tragedies such as this, and partly owing to its convictions, the Rudd Labor Government announced at the end of 2008 that it would establish a national consultation to determine how the human rights of Australians might best be protected. A consultation inquiry panel has been established and will be chaired by Father Frank Brennan. His co-panelists are Mary Kostakidis, Mick Palmer and Tammy Williams.

The Committee will ask the Australian community:

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

As one contribution to the national conversation about these questions, in this essay we first consider the historical and philosophical underpinnings for the legal protection of individuals’ fundamental human rights. Secondly, we examine the nature of existing human rights protections and their adequacy. Thirdly, we examine overseas experience with statutory charters of rights of the kind now being proposed in Australia. Fourthly, we set out the arguments in favour of the adoption of comprehensive legal pro-

tection for human rights in Australia. We then consider, fifthly, the arguments most commonly deployed against the enactment of an Australian Charter of Rights. The final chapter states the conclusions we have reached on the basis of the material so presented.

CHAPTER 2: What are Human Rights?

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To fully appreciate the current debate about whether or not Australia should enact some kind of human rights charter, it is worth spending a moment to reflect on the origin and significance of human rights. If we don't know what human rights are exactly, how they have developed and why they might be important, making a decision about how best they might be protected will be correspondingly more difficult. In this Chapter, therefore, we explore first, the origins and growth of the contemporary understanding of human rights and, secondly, a little of their political and ethical foundations.

Some History

The idea that we, as human beings, possess fundamental human rights is far from new. It can be dated from the late Middle Ages. An early influential statement was that of Thomas Aquinas. Aquinas held that we should recognise the existence of certain natural laws or precepts of justice. Justice, in turn, may be defined as 'what is owed to everyone in common' rather than what may be owed to particular people by reason of their individual circumstances. It followed, Aquinas thought, that everyone is owed an entitlement to life, to reason, to determine their life's course, to live peacefully in society and to seek after God. The connection between these precepts of justice and the fundamental rights that may be derived from them is clear. It is impossible, for example, to determine one's life course unless one can assert a right not to be arbitrarily or indefinitely detained.

Aquinas operated within a religious framework. Natural laws and the natural rights that complemented them were those, in the end, that were attributable to God. In succeeding centuries, however, secularization became ever more prevalent. Our contemporary notion of human rights, therefore, now owes more to the Enlightenment than it does to that theological tradition. In other words, we believe, with the philosophers Kant and

Mill among others, that fundamental moral principles may, equally, be derived from reason alone.

In this enterprise, the statements of fundamental rights developed and advanced during the French and American revolutions of the late eighteenth-century played an immensely important part. They provided the first, foundational lists of rights upon which our contemporary understandings could be built. These rebellions added a further, crucial dimension to rights theory and practice. These initial lists represented and justified claims upon governing authorities. They were political manifestos backed by popular force. Rights, then, were no longer just things to be thought about philosophically. They were to be fought for in the wider interests of justice.

Tragically, however, it took the gravest injustices to prompt the most recent and decisive development in our comprehension of what human rights mean and how they might best be secured. It was the sixty million deaths that occurred during the Second World War and, more particularly, the deaths of six million Jewish people at the hands of the totalitarian, Nazi regime that shocked the world's conscience. It galvanized and provoked global leaders into common and concerted action to prevent any similar, genocidal atrocities from occurring again. Led by the American President, Franklin Roosevelt, the leaders of the victorious Allied powers determined that the protection of the fundamental human rights of all peoples would play a central role in the quest for a new, more civilized global order.

To this end, the United Nations Charter was adopted in 1945 and the United Nations was subsequently established with three principal aims: the maintenance of international peace and security, the pursuit of economic and social development and the promotion of human rights. The United Nations then established a Human Rights Commission whose first task was to draft a global human rights declaration. In 1948 the Commission proposed, and the United Nations adopted, the Universal Declaration of Human Rights. The Declaration stands, still, as the pre-eminent, global statement of the basic rights which all people possess in common – no matter what race, colour, creed, sex or ethnic origin they may be. Every person, no matter where in the world they live, should have an equal entitlement to these rights.

From Nazism to Fundamental Rights

At some sixty years distance from the adoption of the Universal Declaration, it is not realised as forcefully as it once was how crucial peoples' experience of the pathologies and collective madness of Nazism during the Second World War were in determining the content of the rights set down in the Declaration and, consequently, in influencing the essential content of every human rights instrument that has been drafted ever since. Because that experience was so formative, it is worth spending a moment more to reflect on it here.²

The Declaration acknowledges its roots in genocidal terror in its Preamble. It recites as its rationale that contempt for human rights results in 'barbarous acts which have outraged the conscience of mankind'. For that reason if 'man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression' human rights must be protected by 'the rule of law'. The member states of the United Nations affirmed their faith in human rights and in the dignity and worth of the human person. They established the Declaration as a common standard of achievement for all nations and peoples.

Although framed positively, the Declaration's most important provisions are a direct reaction to Nazism's most negative and pathological beliefs and behaviours. The following examples make the point more clearly. Article 1 provides that 'all human beings are born free and equal in dignity and rights' and that 'they are endowed with reason and conscience'. It is a direct reaction to and repudiation of Nazism's propagation of racial superiority and, therefore, people's fundamental inequality. It announces dignity and reason as those qualities of human being most worthy of universal respect and protection. This too is a response to Nazism's drastic assertion that some peoples may be considered as less than human.

Article 2 entitles everyone to rights 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other state'. The provision is a powerful rebuke to the fascist idea of a 'master race'.

Article 5 is a straightforward repudiation of the use of torture and cruel,

inhuman and degrading treatment. There were many forms of such treatment practised during the Second World War but none, perhaps, was as infamous as that of medical experimentation on human beings conducted without their consent and with utter disregard for their physical and psychological well-being. A Nuremberg War Crimes Report listed many forms of such experimentation including 'the sterilisation of women, anatomical research, the inducement of disease including typhoid, surgical castration, heart injections and experiments on children.'

Article 10 provides that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. It takes into account and forbids the replication of Nazism's so-called 'courts', tribunals packed with party ideologues and military apparatchiks established not to hear and determine a criminal case but rather to punish or exterminate certain 'criminal types'.

Articles 19's guarantee of freedom of expression and Article 20's guarantee of freedom of political assembly were referable to Hitler's destruction of the Reichstag and his subsequent decrees forbidding campaign rallies, permitting the arrest of opponents at will and the annulment of almost all the basic rights that had previously been guaranteed by the German Constitution.

These examples are sufficient to illustrate the general point. This is that human beings are capable of behaving terribly to one another; that governments may act appallingly to their peoples; and that, for all the reasons emerging from the account above, people require robust legal protection – not only from the periodic explosion of extreme pathologies but also from the many, more minor but nevertheless serious assaults upon human dignity that governments and other powerful institutions may inflict – not least in times of great stress.

Ethics and Human Rights

As is evident, the Universal Declaration was born in the wake of the dreadful, negative experiences of war. It should not be thought, however, that this is

the sole source of their acceptance and adoption. Harking back to Aquinas and his successors, it is clear too that the idea that we all possess fundamental human rights and are entitled to exercise them has a strong and positive foundation in political and moral philosophy. Several theories of rights have been developed within this tradition. Perhaps the most influential is one which founds human rights in the idea of human dignity or personhood. It is worth exploring this ethical argument in a little more detail.

The idea that all people have certain inalienable rights was profoundly influential in the drafting of the *Declaration of the Rights of Man* in eighteenth century France and the *Declaration of Independence* in America. The French declaration stated that 'the aim of all political association is the conservation of the natural and inalienable rights of man. These rights are: liberty, security and resistance to oppression.' In a formulation just as famous, the drafters of the American declaration wrote that 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness'.

Neither of these declarations, however, goes on to explain why exactly we should consider such rights to be inalienable. The best response to this question seems to be that absent such rights, something or some things essential to our idea of ourselves as human would be lost. So, what is it to be human and what would be lost if we were deprived of the rights that, in a fundamental way, contribute to making us so?

In a recent book, the Oxford philosopher, James Griffin sets down the bones of an answer to the question.³ Griffin argues that what marks us out as human beings is our capacity for reflection and action. Our status as human depends on the capability we have to deliberate, assess, choose and act in ways that will advance our notion of a life well-lived. Human rights, then, are a form of protection of what it is to be human – of our capacity to act consciously and deliberately in the formulation of our life's journey. Griffin calls this the protection of our 'personhood'. He explains the connection between our 'personhood' and the human rights essential to protect it in the following way.

If we take the capacity to reflect and then act as central to our status as human, then our capabilities in this respect are worthy of special protection. First, we must protect ourselves from domination or control by others – whether other people or institutions. If we do not, then our ability to determine our life’s course is destroyed. Second, we must protect ourselves from ignorance and poverty. If we do not, then we will have neither the minimum education nor the minimum resources we require to act in pursuit of our life’s goals. Third, we need protection against being blocked by others. Without that protection, other people or other institutions may deprive us arbitrarily of our liberty – the absolute precondition for the exercise of choice about our lives. Translating all this into human rights terms, Griffin writes:

“Out of our notion of personhood we can generate most of the conventional list of human rights. We have a right to life (without it, personhood is impossible), to security of the person (for the same reason), to a voice in political decision (a key exercise of autonomy), to free expression, to assembly and to a free press (without them the exercise of autonomy would be hollow), to worship (a key exercise of what one takes to be the point of life). It also generates, I should say (though this is hotly disputed), a positive freedom: namely, a right to basic education and minimum provision needed for existence as a person – something more, that is, than physical survival. It also generates a right not to be tortured, because, among its several evils, torture destroys one’s capacity to decide and to stick to a decision. And so on”.⁴

A different but complementary way of looking at this is to say that without human rights we are open to injury. This means more than just experiencing physical or psychological damage, although these are immensely significant. It also embraces something deeper – injury to our sense of ourselves as human or, in other words, to our identity or dignity as members of human society. But what does that mean?

It means, as the discussion about Nazi atrocities above illustrates clearly, that at the extreme we may be stripped of our humanity by being treated as

less than human and even as a thing – as an object of no value. The injury to our sense of who we are provoked by this dehumanisation will be profound as the many testaments of Holocaust survivors have made plain. We do not need to go to the extreme, however, to get a sense of the injury that may be inflicted even in more commonly experienced situations.

So, for example, if you were imprisoned without trial, or following a trial that was unfair, you would legitimately experience both anger and a kind of existential pain. You would rightly experience the arbitrariness and restriction as profoundly unjust.

Or, to take a more contemporary example, if the community to which you belong was subjected to massive government intervention, on a racially discriminatory basis, then no matter how well intentioned the intervenors may be, you might complain legitimately that you were being hurt and degraded at some very fundamental level. Something of the feeling of this was captured vividly, recently by Peter Yu, the Chair of the Inquiry into the Northern Territory intervention when he explained that:

“The key issue for us in the Northern Territory was this feeling of anger and hurt and frustration. The communities felt ‘what’s happened to us, why are we so repugnant to the rest of the nation. We thought we were Australians and yet we’ve had this done to us, what have we done to deserve this? Why are we being subjected to these punitive and coercive measures, measures based on racial differentiation.’”⁵

More generally, we might say that our human dignity will be injured if any one of the following claims is denied:

- a claim to have a life
- a claim to lead one’s life
- a claim against severely cruel or degrading treatment
- a claim against severely unfair treatment⁶

In contrast, the observance of these claims will act as a guarantee that any and every person may live a life that is at least minimally decent and self-directed – a life tolerably free from assaults on human dignity. Here again, these claims may found the human rights now commonly recognised in most major international human rights treaties.

The claim to life, for example, founds the right to life, liberty and security of the person. The claim to lead one's life founds the rights to thought, conscience, religion and belief; to freedom of expression, assembly, association and movement; and to participate democratically in political affairs. The claim against severely cruel treatment founds the prohibitions on torture, slavery and medical treatment and experimentation without consent. The claim against severely unfair treatment founds the right to fair trial; freedom from arbitrary detention; and the social rights to health, education and welfare amongst others.

The Canadian author, Michael Ignatieff captures the essence of the argument well in his recent Harvard lectures:

“In this argument, the ground we share may actually be quite limited: not much more than the basic intuition that what is pain and humiliation for you is bound to be pain and humiliation for me. But this is already something. In such a future, shared among equals, rights are not the universal credo of a global society, not a secular religion, but something much more limited and yet just as valuable: the shared vocabulary from which our arguments can begin, the bare human minimum from which different ideas of human flourishing can take root”.⁷

Here, then, we have the fundamentals of the argument for strong human rights protections. Looked at from one perspective, these protections are absolutely necessary as one form of guarantee against the kinds of terrible behaviour in which people and governments may engage when captured by extremist ideology or collective panic. Looked at from another, human rights protections are absolutely necessary to place a

floor under our existence as decent, reasoned, reflective and active human beings.

In both cases, what is being protected is something essential, that is, human dignity or personhood. What is being encouraged is reasoned deliberation about them and their meaning for behaviour and fulfilment in a decent society. For that reason, the protections in question must of necessity be strong. In this arena, perhaps more than any other, flimsy barricades have proven and will prove of precious little use.

CHAPTER 3: The Protection of Human Rights in Australia

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The Australian legal system promotes and protects human rights through the Australian Constitution, Commonwealth, State and Territory Legislation, the Common Law and to a limited extent, International Law.

The Protection of Rights in the Australian Constitution

The Australian Constitution does not provide for the comprehensive protection of human rights and those it does protect, it does so in a limited way. During the Constitutional Conventions in 1891 and in 1897-98, the main tasks of framers of the Australian Constitution were to:

1. establish the institutions of the Federal Government;
2. allocate the legislative powers between the Commonwealth and the States;
3. specify the interrelations between the Commonwealth and the States;
4. provide for the financial and trade issues arising from Federation; and
5. establish a method of constitutional amendment.

While the federal features of the United States Constitution were highly influential, the framers of the Australian Constitution rejected the inclusion of a comprehensive bill of rights. The reasons for this are largely historical. First, unlike the United States, the transition to Federation in Australia was peaceful and so a constitutional bill of rights was seen as less necessary. Secondly, the protection of the colonies' sovereign entitlement to enact racially discriminatory laws was crucial to their consent to Federation. Thirdly, the framers of the Constitution were influenced by the writings of A.V. Dicey, a 19th century constitutional theorist, whose view was that rights are best protected by the common law and the doctrine of representative and responsible government.⁸

Nevertheless, there was some interest in the protection of rights at the Constitutional Conventions. Inglis Clark, a former Tasmanian Attorney General and author of the 1891 draft constitution, favoured the inclusion of four rights in the Australian Constitution, based on the Constitution of the United States. These were the right to trial by jury, the right to privileges and immunities of state citizenship, the right to equal protection and due process under the law and to the freedom of and non establishment of religion. The inclusion of these rights was met with considerable resistance from other convention delegates. The rights to trial by jury and to freedom of religion were accepted by the delegates but in a somewhat diluted form.

Express Constitutional Rights

The Australian Constitution contains a few express fundamental civil and political rights, namely:

Section 80 – trial by jury

Section 116 – freedom of religion

Section 117 – rights of residents in States

These protections are not stand alone rights. They are merely restrictions on the legislative powers of the Commonwealth.

Section 80 of the Constitution provides a right to trial by jury for Commonwealth indictable offences. The protection afforded by the section is limited in scope.

It does not provide for a right to trial by jury for State and Territory criminal offences. This is a significant limitation as State and Territory laws regulate most criminal offences. Further, section 80 does not grant a right to trial by jury for all serious criminal offences. The section only applies to criminal offences that the Commonwealth deems triable on indictment. Therefore, the Commonwealth Parliament could undermine the right to trial by jury by directing that criminal trials be tried summarily. In relation to this provision Chief Justice Barwick noted:

“What might have been thought to be a great constitutional provision has been discovered to be a mere procedural provision.”⁹

Next, section 116 provides that the Commonwealth shall not pass laws for establishing any religion, imposing any religious observance, prohibiting the free exercise of religion or requiring any religious test as a qualification for any office or public trust under the Commonwealth.

Despite the appearance of section 116 in Chapter V entitled *The States*, the section does not apply to the States and it is not settled whether it applies to laws made by Territories. State governments, therefore, may trespass on religious freedom. Section 116 was inserted into the Constitution to ensure that the power to legislate with respect to religion remained with the States.

While the meaning of religion has been given a broad interpretation by the High Court, the rights contained in the section have been narrowly interpreted and a claim under the section has not yet been upheld. Further, it has been held that while section 116 is a limit on the legislative power of the Commonwealth, a Commonwealth law may nevertheless indirectly limit the free exercise of religion.

Then, section 117 prohibits laws imposing any disability or discrimination on the basis of interstate residence. Unlike sections 80 and 116, the section binds the State and Commonwealth governments.

The Constitution also protects two economic rights, the right to be compensated on just terms for the compulsory acquisition of property and the freedom of interstate trade and commerce. Section 51 (xxxix) allows the Commonwealth Parliament to compulsorily acquire property from any State or person. However, the Commonwealth must provide just terms, that is, fair compensation for the acquisition. This provision was introduced into the Constitution, not as a limitation on parliament’s power, but to ensure that there was an express provision giving the Commonwealth the right to acquire property.

Despite a broad interpretation by the High Court of the concept of ‘property’ and what amounts to ‘just terms’, there are limitations on the section. The section does not apply to the States, and by virtue of section 122 of the Constitution, the Commonwealth is not required to provide just terms when

acquiring property from a Territory or a person within a Territory. Moreover, a reduction or diminution in property does not amount to an acquisition of property and therefore just terms are not required.

One of the primary reasons for Federation was to create a unified commercial market free from colonial tariff barriers, duties and imposts. To this end section 92 of the Constitution provides that trade, commerce and intercourse among the States shall be absolutely free. The High Court of Australia has upheld this guarantee of economic freedom on numerous occasions. Its object is to prevent Commonwealth and State laws that discriminate against interstate trade and commerce in a protectionist way.

Implied Constitutional Rights

The protection of rights and freedoms under the Australian Constitution is not limited to the express rights discussed above. More recently, the High Court has developed a number of significant implied rights from the text and structure of the Constitution.

In a series of decisions from 1992, the High Court has held that the Constitution – through sections 7 and 24, which provide that members of the Senate and the House of Representatives “be directly chosen by the people” – guarantees a system of representative democracy. Such a system necessitates the freedom to freely communicate on political and public matters between electors and the elected representatives to parliament.¹⁰

However, the implied freedom of political communication is not absolute. An Act may restrict the freedom so long as it is aimed at a legitimate public purpose, such as public safety, and is appropriate and adapted to that purpose. Further, the freedom only applies to political communication. It is not a general guarantee of freedom of speech, thought or communication. Rather, it is an immunity from legislative or executive action prohibiting political communication.

In the recent decision of *Roach v Electoral Commissioner*, the High Court upheld an implied right to vote based on sections 7 and 24 of the Constitution. Yet again, this implied right is not absolute and may give way to legislation embodying some competing and compelling public interest.¹¹

Next, the doctrine of the separation of powers is implicit in the structure of the Australian Constitution. Chapter I of the Constitution vests legislative power in the Commonwealth Parliament and Chapter II vests executive power in the Queen that is exercisable by the Governor General. Chapter III of the Constitution vests federal judicial power in the High Court and any other courts the federal parliament creates, or in such other courts as it invests with federal jurisdiction.

This separation of judicial power from the other institutions of government has given rise to the recognition of a number of important implied constitutional guarantees.

- The legislature may not exercise judicial power, for example, it cannot detain a person involuntarily in the absence of a criminal trial.
- The legislature cannot direct the courts as to how they should perform their functions.
- The judiciary cannot perform its functions in a manner inconsistent with the essential nature of judicial power. That is, the courts cannot act in a way that would deny procedural fairness to the parties in dispute.

These implied rights have provided some protection to accused persons in the criminal process.

Anti Discrimination Legislation

Anti Discrimination legislation has been enacted at the Commonwealth, State and Territory level.

The most important Commonwealth Acts are:

- *The Racial Discrimination Act* 1975,
- *The Sex Discrimination Act* 1984,
- *The Disability Discrimination Act* 1992, and
- *The Age Discrimination Act* 2004.

The *Racial Discrimination Act* and the *Sex Discrimination Act* were passed by the Federal Government under the external affairs power in section 51(xxix) of the Constitution following Australia's ratification of a number of international human rights treaties. These Acts prohibit discrimination in employment, the provision of goods and services, education, housing and membership of clubs and associations.

The Australian Human Rights Commission (formerly the Human Rights and Equal Opportunity Commission) was established in 1986 to support the anti-discrimination laws. The functions of the Commission are to conciliate disputes about unlawful discrimination and hold inquiries into contemporary discrimination issues. An example of such an inquiry is the 1997 *Bringing them Home Report* on the Stolen Generation. The Commission may also intervene in judicial proceedings, with leave of the court, where human rights issues are in question.

Although the Anti-Discrimination Acts play an important role in the protection of human rights, they are not a comprehensive guarantee of equal treatment in Australia. They are at best legislative compromises that have attempted to balance the interests of different groups and have been deliberately confined to particular fields and particular activities within those fields. There are exemptions from the statutory regimes that allow certain organisations to act outside human rights obligations. Moreover, some significant grounds of discrimination, such as religion, political belief and sexual preference are not covered under the Acts.

A further weakness in the Anti-Discrimination laws is that they are vulnerable to amendment and repeal by subsequent legislation. The *Northern Territory National Emergency Response Act* 2007, for example, suspended the operation of the *Racial Discrimination Act* in so far as it affected the intervention.

The Australian Human Rights Commission has few coercive powers. It cannot take direct action to protect an individual's rights, even though the International Covenant on Civil and Political Rights which it is designed to implement is annexed to the Act. The role of the Commission is limited to investigating and conciliating disputes. Complaints that cannot be resolved

must be taken by the parties to the Federal Court or the Federal Magistrates Court, usually at great cost.

The Protection of Human Rights under the Common Law

The common law's protection of fundamental human rights can be traced back to the Magna Carta. Blackstone's *Commentaries on the Laws of England*, published in 1735, stated that the right to personal security, the right to personal liberty and the right to private property are rights inhering in all mankind. Many individual freedoms are protected by the common law. Personal freedom is protected by the law of assault, battery and false imprisonment; reputation by the law of defamation; and a variety of interests by the torts of negligence, trespass and nuisance.

Over time the influence of parliament in the regulation of public life has grown substantially. In consequence, legislation has increasingly displaced the rights recognised by the common law. Today, common law principles that had once been enforceable by the courts have been converted instead into presumptions to be applied in statutory interpretation. Some examples include:

- a presumption that parliament does not intend to deny citizens the protection of natural justice
- a presumption that parliament does not intend to oust the jurisdiction of the superior courts
- a presumption against the invasion of common law rights by the legislature
- a presumption that a statute that purports to impair personal liberty is to be interpreted, where possible, to respect that right.

This interpretive process affords some limited protection for individual rights and freedoms. However, if the parliament has directed its attention to the curtailment of a basic human right, and has used unambiguous language to do so, then the common law is simply overridden.

International Law and the Development of Rights under the Common Law

Australia has ratified the following international treaties that protect important human rights. These include:

- The International Covenant on Civil and Political Rights (ICCPR)
- The International Covenant on Economic, Social and Cultural Rights (ICESCR)
- The Convention on the Elimination of all forms of Racial Discrimination
- The Convention on the Rights of the Child
- The Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment
- The Convention on the Elimination of all forms of Discrimination against Women
- The Convention on the Rights of Persons with Disabilities

There is some capacity for Australian courts to take international treaties into account when interpreting legislation and developing the common law. The *Mabo* decision on native title explains and illustrates how international law may influence the development of the common law. But while it is a principle of statutory interpretation that legislation should be interpreted as far as possible in conformity with international law, unambiguous language will override any obligations arising from treaty ratification. Some members of the High Court have interpreted legislation consistently with international human rights law but this approach has by no means been fully embraced by the Australian judiciary.

Conclusion

It will be plain from this discussion that the Australian constitutional and legal system does not provide a comprehensive scheme of human rights protection. The few human rights provisions in the Constitution are scattered throughout the text and are ad hoc rather than comprehensive in nature. The civil rights have been subject frequently to narrow reading by the High Court and apply only to the laws of the Commonwealth and not the States.

Constitutional implied rights have only a fragile standing in the constitutional fabric. The Anti-Discrimination Acts play an important role in the protection of human rights. Nevertheless they are not a comprehensive guarantee of equal treatment in Australia. The Acts do not fully meet Australia's international obligations under treaties such as the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights. Moreover, the Acts are vulnerable to subsequent legislative amendment. Contrary to wide spread public opinion, the common law is now the least significant and most insecure source of human rights protection as it may readily be overridden by parliamentary enactment.

CHAPTER 4: International and Domestic Experience with Human Rights Legislation

Formal human rights protection may be achieved through the use of various models from constitutional bills of rights, such as the *United States Bill of Rights* (1791), the *Canadian Charter of Rights and Freedoms* (1982) and the *South African Bill of Rights* (1996); to legislative bills of rights such as the *New Zealand Bill of Rights Act* (1990), the United Kingdom *Human Rights Act* (1998), the Australian Capital Territory's *Human Rights Act* (2004) and the Victorian *Charter of Human Rights and Responsibilities Act* (2006). In recent times there has been a movement away from constitutional bills of rights towards legislative bills of rights that preserve the primary role of parliament in determining how to protect and promote human rights. These statutory bills of rights are often referred to as 'dialogue' bills of rights as they provide all three arms of government, the executive, the parliament and the judiciary, with a special role to play in the protection of human rights. The key features of a dialogue model of human rights protection are as follows:

- The Executive Government is responsible for ensuring that the Bills it introduces into parliament are compatible with human rights. Government departments are responsible for ensuring that policy and all decision making is compatible with human rights.
- The parliament is responsible for reviewing all Bills and reporting on their compatibility with human rights prior to any Bill being debated and voted on.
- The Judiciary is responsible for hearing and determining cases in which an individual argues that legislation passed by parliament or actions of government departments or agencies has infringed their human rights.

It is important to note that under a statutory bill of rights the courts do

not have the power to invalidate or repeal legislation. They can only interpret legislation in a manner that is consistent with human rights and, if this is not possible, state that they are unable to do so. The legislation then goes back to the parliament to determine what action, if any, is to be taken to rectify the situation.

In this Chapter we do not discuss constitutionally entrenched bills of rights because we do not consider them appropriate to Australia. This chapter, therefore, concentrates on statutory bills of rights and on the experience with such bills in New Zealand, the United Kingdom, the Australian Capital Territory and Victoria.

The New Zealand Bill of Rights Act 1990

In 1984 a Labour Government came to power in New Zealand with a policy platform that included a Bill of Rights as a supreme law. In 1985 a draft Bill was completed and the White Paper entitled *A Bill of Rights for New Zealand* was released. The White Paper proposal did not proceed but in 1990, a statutory bill of rights, the *New Zealand Bill of Rights Act (1990)* was enacted instead. The Act is an ordinary Act of Parliament and its amendment is not subject to any special procedures.

The Model

The purpose of the *Bill of Rights Act* is to restrain the government's ability to limit an individual's rights and freedoms. Section 3 states that the *Bill of Rights Act* applies to acts done by the legislative, executive and judicial branches of the government of New Zealand; or to a person or body performing a public function, power or duty imposed or pursuant to law. The Act will, therefore, extend to private organisations in the exercise of any public duties.

The human rights protected by the *New Zealand Bill of Rights Act* are drawn from the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. While certain rights are absolute, most are subject to some limitations. The rights and freedoms contained

in the Act may be subject to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.¹² The onus on proving that the limitation on any particular right is reasonable lies with the relevant government body imposing the limit.

The *Bill of Rights Act* plays an important role in setting minimum standards to which public decision-making must conform. It does this in three ways:

1. Section 7 of the Act requires the Attorney General to notify parliament of any provision in any Bill introduced into parliament that appears to be inconsistent with the *Bill of Rights Act*.
2. Section 6 provides that legislation should be interpreted consistently with the *Bill of Rights Act* wherever such an interpretation is permissible. This interpretive direction to the courts to give effect to the rights and freedoms is a strong one.
3. Section 3 provides that the *Bill of Rights Act* applies to the legislative, executive and judicial branches of government and to any person or body in the exercise of public functions. It prevents decision makers from exercising their discretion in a way that infringes a right or freedom. The Ministry of Justice provides advice to government departments in developing policies that are consistent with the *Bill of Rights Act*.

The *Bill of Rights Act* has no express remedy provision, although the courts have developed a variety of remedies for breaches of the rights and freedoms protected by the Act. These include the exclusion of evidence obtained following a breach of the Act; issuing a stay of proceedings; declaring an action of a public body to be inconsistent with the Act; and sending the decision back to the original decision maker for reconsideration and the award of monetary compensation.

Effectiveness of the Bill of Rights Act

The major reports on the New Zealand Act have concluded that:

1. The legislative process has improved. The following procedure has been adopted within the parliament to ensure compliance with the Act. First, the Cabinet Office Manual requires the Minister responsible for the Bill to certify that it complies with the *Bill of Rights Act*. If the Bill does not comply with the Act, the Attorney General must provide reasons for the incompatibility. Second, the Standing Orders of Parliament have been amended and now require the Attorney General to table a report in parliament setting out the alleged inconsistency. These reports are made public on the Ministry of Justice's website. If the government wishes to proceed, notwithstanding the inconsistency, the Bill must be referred to a Select Committee for review. The impact of this work has been more significant than that of the courts in ensuring that New Zealand adheres to the human rights standards it has embraced.¹³
2. The role of the courts has been enhanced with human rights values, which the courts used to draw on, now having greater legitimacy as a result of parliament affirming them in the Act.
3. The Act puts the Executive through a rigorous process of reporting to parliament where proposed legislation is in breach of the Act.
4. Initially there was a significant amount of litigation in respect of criminal process rights such as the right to a lawyer on arrest or detention, trial delay and the reasonableness and lawfulness of police search and seizure. However, over time police procedures have improved and these cases have gradually decreased.¹⁴ The Act's impact on civil litigation is yet to be felt although there have been successful challenges to prison management and disciplinary regimes, censorship decisions and immigration decisions.
5. The New Zealand experience has shown that a genuine dialogue can exist between the three arms of government with each arm participating in developing a greater understanding and compliance with human rights and freedoms.

The United Kingdom Human Rights Act (1998)

The European Convention of Human Rights (the Convention) was drafted with considerable input from English lawyers and ratified by the United Kingdom in 1951. From 1966 individuals had a right of petition before the European Court of Human Rights in Strasbourg. Despite access to the European Court for alleged breaches of the Convention, the time and expense involved in bringing such an action meant that only the most serious human rights allegations could be brought to Strasbourg. In 1997 the government published the White Paper *Bringing Rights Home* leading to the *Human Rights Act (1998)*. This Act, among other things, has made the rights of the European Convention on Human Rights enforceable in the United Kingdom courts.

The Model

The Act reproduces in domestic law the provisions corresponding to the United Kingdom's international obligations under the European Convention on Human Rights. The purpose behind the *Human Rights Act* was to develop a culture of rights in the United Kingdom and to create a dialogue about rights between the executive, parliament and the judiciary. The *Human Rights Act* is an ordinary Act of Parliament and its future amendment is not subject to any special procedures.

The following provisions underpin the *Human Rights Act*:

- Section 6 of the Act makes it unlawful for a public authority; defined widely to include courts, tribunals, Ministers and public officials; to act in a way that is incompatible with a Convention right.
- Section 4 confers on the higher courts a power to make a declaration of incompatibility where a provision of primary legislation is incompatible with a Convention right. This declaration of incompatibility does not affect the validity of the legislation and it is not binding on the parties. Where a declaration of incompatibility is issued, the courts are to notify the relevant Minister and any remedial action is left to the parliament. In this way the sovereignty of parliament is

maintained. The reason behind this was explained in the White Paper introducing the Human Rights Bill:

“In enacting legislation, parliament is making a decision about important matters of public policy. The authority to make those decisions derives from a democratic mandate. Members of parliament in the House of Commons possess such a mandate because they are elected, accountable and representative. To make provision in the Bill for the courts to set aside Acts of Parliament would confer on the judiciary a general power over the decisions of parliament which under our present constitutional arrangements they do not possess, and would be likely on occasions to draw the judiciary into serious conflict with parliament.”¹⁵

- Section 3 of the Act requires that as far as it is possible to do so, legislation must be read and given effect in a way that is compatible with the Convention rights. This interpretive requirement applies to all litigation before the courts, whether or not a public authority is involved. This strong interpretive clause goes beyond the previous position where the courts could take the Convention into account only when resolving any ambiguity in a provision. The intention behind this interpretive provision was to ensure that declarations of incompatibility would be employed in a minority of cases.
- Section 19 of the Act requires the Minister responsible for a Bill, before the second reading speech, to make a statement as to the Bill’s compatibility with the Convention rights. If the Minister is unable to make a statement to that effect he/she must indicate that the government nevertheless wishes to proceed with the Bill. The implication is that the two Houses will consider the merits of the statement and evaluate the implications of the Bill on Convention rights.
- Section 7 of the Act provides that where a public authority acts in a way that violates a Convention right, an aggrieved individual may bring proceedings against that public authority.

The Role of the Joint Parliamentary Committee on Human Rights

The Joint Parliamentary Committee of Human Rights, a Select Committee consisting of members of both Houses of Parliament, was appointed in 2001. The Committee has played an important role in the promotion and protection of rights within government. It is responsible for scrutinising all Bills for compatibility with the *Human Rights Act* and to draw the attention of the government and parliament to any potential human rights implications.

Effectiveness of the Human Rights Act

The Department of Constitutional Affairs released the *Review of the Implementation of the Human Rights Act* in July 2006. The review found:

- “Decisions of the United Kingdom courts under the *Human Rights Act* have had no significant impact on the criminal law, or the government’s ability to fight crime.”
- “The *Human Rights Act* has had a beneficial impact on the law, and has led to a positive dialogue between the judges in the United Kingdom and those at the European Court of Human Rights.”
- “The *Human Rights Act* has not significantly altered the constitutional balance between the Parliament, the Executive and the Judiciary.”
- “The *Human Rights Act* has had a significant, but beneficial, effect upon the development of policy by central government.”
- “Formal procedures for ensuring compatibility, together with outside scrutiny by the Parliamentary Joint Committee on Human Rights, had improved transparency and parliamentary accountability.”
- “The *Human Rights Act* leads to better policy outcomes, by ensuring that the needs of all members of the United Kingdom’s increasingly diverse population are appropriately considered. It promotes greater personalisation and, therefore, better public services.”¹⁶

A new report by the British Institute of Human Rights “*The Human Rights Act - Changing Lives*,”¹⁷ draws on sixteen case studies to illustrate the impact

of the *Human Rights Act* on the lives of ordinary people. The report demonstrates that people are benefiting from the Act even without resorting to the courts. Some examples include:

1. An elderly woman in a London hospital was strapped into a wheelchair against her wishes. The staff had fastened her into the wheelchair to prevent her from walking around the ward, falling and causing injury. A consultant explained that this could be considered degrading treatment contrary to Article 3 of the Convention. Staff agreed not to continue with this and a physiotherapist was engaged to help the staff improve the patient's mobility.¹⁸
2. An elderly couple who had been married for 65 years were separated when the husband was moved into a residential care facility. The wife requested to join her husband at the facility and this request was denied by the local authority as she did not fit the criteria for placement. A campaign was commenced by the family, and human rights experts, arguing that the local authority had breached the couple's right to respect for family life in Article 8 of the Convention. The local authority agreed to reverse its decision and offer the wife a subsidised place so that she could join her husband.¹⁹

The Australian Capital Territory's *Human Rights Act (2004)* and Victoria's *Charter of Human Rights and Responsibilities Act (2006)*

Both the Australian Capital Territory and Victoria have, after extensive community consultation processes, adopted statutory human rights instruments that resemble the model adopted in the United Kingdom. The Acts protect human rights drawn from the International Covenant on Civil and Political Rights. The aim of the Acts is to foster a dialogue about human rights between all arms of government. Both Acts protect parliamentary sovereignty by leaving the final decisions about human rights protection to the parliament. The Acts have not generated significant additional litigation and there have been no declarations of incompatibility yet issued by the courts.

The most important effects of the Acts have been on the legislative and the executive branches of government. A recent review of the ACT *Human Rights Act* found that "the biggest impact of the Act has been in influencing the formulation of government policy and new legislation."²⁰ In Victoria there are indications that the *Charter of Human Rights and Responsibilities Act* is improving the accountability and transparency of government and is being used by community advocates to promote human dignity and tackle disadvantage.²¹

A Human Rights Act for Australia

It is clear from this international and domestic experience that comprehensive human rights legislation can have a strong, positive impact by increasing the awareness in government of human rights considerations and by strengthening the accountability of the public service to the public it serves. Given the success of these models, we suggest that an *Australian Human Rights Act*, if enacted, should be comprised of the following features. A fully drafted model Act is available for information at www.humanrightsact.com.au

- The Act should take the form of an ordinary parliamentary enactment. It is not proposed to entrench human rights provisions in the Australian Constitution.
- The Act should set down the civil and political rights, and the economic and social rights, to which all Australians will be entitled.
- The rights the Federal *Human Rights Act* should protect fall into five categories:
 - *Personal rights* such as the right to life, liberty and security; and the right to freedom from torture and other forms of cruel, inhuman or degrading treatment.
 - *Civil and Political Rights* such as freedom of expression, assembly, association and movement; the right to vote; and the right not to be discriminated against by reason of race, sex, nationality, ethnic origin, political opinion, disability, sexual orientation and other similar grounds.

- *The Rights of Individuals in Groups* such as the right to privacy and family life; the right to property; and the right to pursue one's own customs and culture.
- *Legal Rights* such as the right to be presumed innocent until proven guilty; the right not to be arbitrarily detained; and right to fair trial.
- *Social Rights* such as the rights to health, education and social security.
- The Act should provide that, as far as possible, all legislation should be interpreted in a manner that is consistent with the protection of the rights which it recognises.
- The Act should provide for all three branches of government – the executive, the legislature and the judiciary – to share in the responsibility for protecting and advancing human rights.
- Higher courts may declare that a law is incompatible with human rights but it will be up to the parliament to determine what action, if any, is to be taken to rectify that incompatibility.

We note that some concern has been expressed in legal circles regarding the constitutional validity of such declarations of incompatibility. While the matter is not free from doubt, in our view much the stronger argument is that such declarations are consistent with the proper exercise of federal judicial power under the Constitution.

In the next Chapter we elaborate on the arguments in favour of the adoption of a Human Rights Charter of this kind and then consider the objections to such an initiative.

CHAPTER 5: The Case for a Charter

With the brief description of the key features of a possible Australian Human Rights Act in mind, we can now proceed to consider in some detail the case for the enactment of such legislation. There are five, core arguments in favour of a Human Rights Act. They are:

1. A Human Rights Act would improve the quality and accountability of government.
2. A Human Rights Act would consolidate and strengthen human rights protections for all Australians.
3. A Human Rights Act would encourage social inclusion.
4. A Human Rights Act would improve Australia's reputation abroad.
5. A Human Rights Act would constitute one effective, legal and political response to human rights violations that have taken place and are taking place in contemporary Australian society.

The Quality and Accountability of Government

The Act proposed imposes obligations on all three branches of government to promote and protect human rights. Both the government and the parliament have particular duties, each of which can be expected to strengthen their accountability substantially.

In relation to the government, the Minister responsible for introducing legislation into the parliament must issue a statement of compatibility. The statement of compatibility will contain the Minister's view as to whether or not the provisions of the Act being introduced are consistent with the rights set down in the Human Rights Act.

The principal benefit of this process resides in its effect on internal governmental deliberation with respect to proposed new laws. Ministers will want to ensure that the advice they give to the parliament as to legislation's compatibility is accurate and reasoned. The political consequences of inac-

curacy could be costly. Departments and agencies, therefore, will be under instruction to consider the human rights impact of proposed legislation very carefully. This can be expected, in turn, to make the policy development process more rigorous and considered.

This observation has been confirmed in research conducted on the introduction of the *Human Rights Act* in Britain. The Lord-Chancellor's review of the first five years of the Act concluded that it had had a significant, beneficial effect on policy development within central government.²² The positive effect had been generated in three different ways. First, the requirement for a positive statement of compatibility had increased attention to the human rights impact of new laws and policy. Secondly, the prospect of future litigation and possible reversals in the courts had provided an impetus for more focused deliberation. Thirdly, the Act makes it unlawful for a public authority to act in a manner that is incompatible with the human rights recognised within it. This has given the Act an immediacy and impact to which all government agencies have had to respond, for fear of transgressing the law.

The other important segment of pre-legislative scrutiny relates to the review of legislation to be undertaken by the parliament. In Britain, the Joint Parliamentary Committee on Human Rights has engaged in enormously important work. That work is of three different kinds. The Joint Committee is responsible for scrutinising all Bills for compatibility with the Act's provisions. By issuing timely reports on such Bills, parliamentary debate on legislation is more fully informed. The Committee engages in thematic work, for example, the Joint Committee has produced reports on deaths in custody, human trafficking, the rights of elderly people in health care, and the human rights of people with learning disabilities. These, too, inform the policy and legislative process. Latterly the Committee has altered its emphasis to focus on earlier stages of the legislative cycle. So, for example, it now comments selectively on government White and Green papers where it believes it may have greater influence upon government thinking.

The Better Protection of Human Rights in Australia

At present, Australians' human rights rely for their protection principally

upon the common law and statute law. Constitutional protections are few. International protections lack enforceability.

It is often thought that our human rights are protected adequately by the common law. As will have become evident from our discussion on this subject in Chapter 3, the protections offered by the common law are inconsistent, frequently delayed and fragile. The fundamental point about the common law is that it may at any time be overridden by legislation. Parliament may remove rights established by the common law at a stroke.

At the same time, a constitutional event of great significance has occurred in Australia in the past few decades. The doctrine of ministerial responsibility has been profoundly undermined. Ministers, seemingly, do not resign for anything. The parliament's capacity to hold the executive to account has been substantially diminished.²³

There have been other related changes. Rigid party discipline; the rise of an unaccountable cohort of ministerial advisers; the privileged access to politicians obtained by shadowy lobbyists; ministerial evasion in question time; the idea that ministers may avoid responsibility for the actions of their advisers and bureaucrats so long as they are not told of such actions; the abuse of freedom of information laws; the frequent and strategic use of the gag in parliamentary debate; attacks upon independent government scrutineers such as the Ombudsman, the Auditor-General and the Administrative Appeals Tribunal; a general decline in parliamentary standards; and the privatisation and corporatisation of government such that ministers may claim no longer to be responsible for the conduct of important public functions; have all contributed to what is now a profound constitutional weakness.²⁴

If the rights of citizens are transgressed, ministers need no longer leave their posts, so long as the support of the Prime Minister or party is assured. As illustrated graphically under the previous government, with a majority in both the House of Representatives and Senate, an administration may ram legislation through the parliament at will. The idea that human rights infringements will readily be remedied through parliamentary redress, therefore, no longer has currency or clout. The former Chief Justice of the High Court, Sir Anthony Mason summarised the situation accurately:

“The convention that the minister bears individual responsibility for the mistakes of his or her departmental officers and subordinates was once thought to be fundamental to the claim of legitimacy of executive power. Now the convention seems to be of largely historical interest. Ministers rely on the mistakes of subordinates as a response to criticism and as a reason why they should not resign. Failure to give relevant, perhaps embarrassing information to the minister is not an occasion for the minister’s resignation. Nor, it seems, is it invariably an occasion for disciplining the public servant. The modern practice is scarcely a recipe for good government ... Here we have a classic example of the executive controlling parliament – the very converse of the historical conception that parliament’s role is to act as a watchdog over the executive government.”²⁵

With this background in mind, it becomes clearer why carefully constructed human rights legislation is necessary. Such legislation would contribute to the protection of peoples’ fundamental human rights in the following ways.²⁶

1. A Human Rights Act would act as a measured constraint upon governmental power. The Act will make it unlawful for public authorities to act inconsistently with fundamental human rights. Most often it is not legislation itself that trespasses upon an individual’s rights but the actions of government departments and agencies. The quality and timeliness of services provided by such agencies would improve significantly were they to be subject to regular review according to human rights criteria.
2. A Human Rights Act would act as benchmark for legislation. As argued in the previous section, the processes of internal and parliamentary pre-legislative scrutiny, including the scrutiny by parliament of policy papers and bills with a view to engendering more informed parliamentary debate, will have a substantial, beneficial impact upon parliamentary debate and discussion.
3. Through its requirement that legislation be interpreted, as far as possible, so as to be compliant with human rights standards, a Human Rights Act would introduce elements of principle into the interpretation and application of legislation. This interpretive obligation will have an impact not only upon courts but also upon government departments and agencies to read and give effect to human rights principles in law, policy and practice.
4. Under the model suggested, as in the UK, an individual would be able to take legal action against public authorities to obtain redress where their human rights have been violated. The very fact that such action may be contemplated can be expected to have a disciplining effect upon officials involved in the provision of public services.

Human Rights and Social Inclusion

The present Federal Government has made clear its commitment to the reduction of social exclusion across all segments of society. Social exclusion is a process in which some individuals or groups are incapable of participating actively in society. This lack of capability may be caused either because there are externally created barriers to participation or because the individuals or groups concerned lack the economic or social resources to take part in community affairs.

In speaking to the government’s social inclusion agenda, the Deputy Prime Minister, Julia Gillard, identified a number of critical arenas in which social exclusion is apparent.²⁷ To be socially included, she argued, would require concerted action in relation to the provision of employment opportunities; accessing services; dealing with personal crises such as ill health, bereavement, and the loss of a job, connecting with others in life through family, friends, work, personal interests and local community; and being heard. The overall objective of the government’s agenda, she said, was creating prosperity with fairness.

To achieve fairness, every person’s basic liberty should be secured by society and by the governments’ observance of their fundamental human rights – rights such as freedom of speech, religion and conscience, due proc-

ess and equal protection under the law. Similarly, every person should be entitled to basic opportunity, to such things as decent work, adequate health care, education, housing and social security. The provision of such entitlements places a floor under people's capacity to participate in society. It confers on them capabilities which, in other circumstances, they may not have been able to develop.

Human rights legislation can also facilitate the fair resolution of conflict between people of different customs and cultures. It sets down ground rules by reference to which inter-cultural dialogue may be promoted and in accordance with which such conflict may be mediated and resolved. It provides a fair framework within which competing interests and values may be reconciled. It sets the foundation for constructive social and political deliberation. By reference to human rights, everyone has a starting point from which to participate actively in the life of the community.

The great advantage of the human rights framework resides in its universality. It picks up everyone's interests. It excludes no one. It provides a contemporary set of common values to which all the communities which make up society may subscribe.

Strengthening Australia's International Reputation

Early in 2008, the Prime Minister announced that Australia would seek election to the United Nations Security Council. Without doubt, this bid will provoke renewed international interest in and concern with Australia's role and performance in international affairs. On any account, Australia's case for election is a strong one. And yet, the nation's international standing has slipped in the last decade or so. This has occurred, among other things, because of the nation's close identification with the unpopular, unilateralist stance taken to the conduct of international political affairs by the former United States administration.

One lesser known symptom of this unilateralist position has been Australia's straight out rejection of comments and criticisms made of its human rights record by the United Nations Human Rights Treaty Monitoring Committees. All six such committees have issued critical reports of Australia's

human rights record, reports which have expressed concern in relation to a perceived decline in Australia's commitment to international and national human rights protection in the last decade or so.²⁸

Before describing the tenor of such criticisms, it is appropriate to note that the United Nations Human Rights Treaty Committees have generally been positive about Australia's human rights record. There can be little doubt, on a close reading of the Committees' concluding observations, that Australia's performance of its obligations under each of the six treaties is regarded in a reasonably favourable light. At the same time, it is also clear that each Committee has become more critical of Australia's human rights performance than it had been in reports issued in the early 1990s.

The six Committees' criticisms of Australia's human rights performance have strong common threads. The criticisms are not the product of a rogue member or two or even a rogue committee or two but have been consistent and concerted. Three such threads in particular stand out.

First, Australia has been criticised because it has not taken sufficient steps to ensure that the comparative disadvantage of and discrimination against its indigenous peoples is eliminated. In this regard, the significant differences between Aboriginal and non-Aboriginal people's standards of health, education and housing; the introduction of mandatory sentencing; the high rate of Aboriginal incarceration and the lack of effective reconciliation with and compensation for the members of the Stolen Generations were marked out consistently for adverse comment.

Secondly, Australia has been criticised because of its treatment of people seeking asylum. The policy of mandatory detention of those requesting refugee status; the isolated and harsh circumstances of their detention; and the lack of legal and social entitlements afforded them even after refugee status has been conferred, have been the subjects of deep concern.

Thirdly, Australia has been criticised because, unlike every other Western democracy, it has not entrenched human rights protections comprehensively either constitutionally or in statute. It has not incorporated the provisions of a number of the United Nations Human Rights Conventions and Protocols in domestic law in a manner that would provide an individual

whose rights had been infringed with an appropriate and accessible domestic remedy.

None of the criticisms levelled by the Committees could be regarded as either surprising or particularly wide of the mark. Almost every expression of concern raised by the Committees had previously been the subject of intense political discussion and debate within Australia itself. As the former Human Rights Commissioner, Professor Chris Sidoti, remarked in evidence before the Joint Parliamentary Committee on Foreign Affairs, Defence and Trade:

“Over the last two years, Australia has been criticised repeatedly by every one of the six human rights treaty committees for shortcomings in our performance. Those shortcomings are not necessarily the performance of the present Australian Government. Many arise from historical factors the present government inherited. But that fact does not take away from the defensive hypersensitivity of the (Howard) Government to criticisms when they have been delivered Not once has a treaty committee expressed a view on a particular Australian human rights issue that is at variance with the views expressed previously and repeatedly by the Australian Human Rights Commission itself and human rights groups within Australia.”²⁹

It needs to be acknowledged that the present government carries with it a significantly different attitude to compliance with its international human rights treaty obligations. This has been exemplified, among other things, by its ratification of the new International Convention on the Rights of Persons with Disabilities; its professed intention to ratify the Optional Protocol against Torture and the Optional Protocol to the International Convention on the Elimination of Discrimination against Women; and its significant changes to immigration and refugee law. No doubt too, the government's announcement of the present consultation will be greeted with approval in the international community.

There is one other important matter related to Australia's position in the international arena that also merits brief comment. Australia, as has often

been observed, is the only remaining member of the club of Western democracies not to have adopted a constitutional or statutory charter of rights. Because this is so, and particularly since Britain has adopted its *Human Rights Act*, Australian law, as judicially interpreted, has drifted steadily from its international moorings. Whereas other Westminster nations have developed law and legal principle by reference to international human rights law and incorporated interpretive methods such as the consideration of legality, necessity and proportionality into their reasoning, Australia's High Court and other superior courts have refrained from doing so. Australian law, and in particular public law, has become far more insular in consequence.³⁰

Human Rights Infringements in Australia

In recent times, executive detention has become one of the nation's great human rights fault lines. The problem emerged following a series of High Court decisions on people seeking asylum. The court, in the case of *Woolley*, previously referred to, found itself powerless to order the release of children in detention in the face of a clear enactment that made no exception for children. This was despite the fact that their human rights had plainly been violated.

In the face of a seemingly intractable statutory provision, the court could do nothing in the case of *Al-Kateb* but decide that a stateless person could be detained by the executive government indefinitely and, if necessary, for life. It was seemingly not to the point that incarceration for life without charge and without a fair trial infringed almost every one of that person's legal rights, recognised by both international and common law.

The High Court determined, in the case of *Behrooz*, that no matter how long a person seeking asylum was detained, and no matter how bad the conditions of that detention, incarceration would not be regarded as punitive as long as the purpose of the governing law was non-punitive. This precluded the court from determining the continuing validity of the applicant's detention. It was the ultimate triumph of form over substance.

The introduction of Australia's new anti-terror laws has added an additional dimension to the problem. Among other things, these laws provide that Australians, suspected but not proven to have been involved in terror-

ism related activity, may be detained for weeks or placed on control orders for up to a year. No charge or trial is necessary. The laws have been broadly framed and the powers they confer on the government have been imprecisely defined, leaving them open to misuse.³¹ The Haneef case, in which an Indian doctor was detained for weeks only to have the case against him completely collapse for lack of evidence, provides one powerful example.

It is said that there are adequate judicial safeguards. In reality, judges issue warrants for preventative detention not in their capacity as judges but in their personal capacity. This gives investigative proceedings the veneer of judicial impartiality. In reality, as Justice McHugh of the High Court said in a similar context, it puts the 'designated person in the uniform of the constable'.

The relevant judicial proceedings can be very one sided. People who are detained may not be provided with the evidence on which the relevant suspicion is based but only with a summary of that evidence. Alternatively, under national security laws, the Attorney-General may issue a certificate forbidding a person under suspicion from hearing or seeing the evidence against them if he or she believes that the disclosure may constitute a threat to national security. A person's right to be heard and to challenge the case against him or her may therefore be deeply compromised.

No account of human rights violations in Australia would be complete without substantial reference to the economic, social and cultural disadvantages suffered by this nation's indigenous people. There is not room here to elaborate upon them all. But no one can have failed to be moved by the plight of the Stolen Generation for whose suffering a national apology has now been received but for whom no legal remedy in the form of fair compensation seems even distantly in prospect. It is similar with the more recent catalogue of abuse and degradation described vividly and painfully in the *Little Children are Sacred* report on the basis of which the Northern Territory intervention has been founded.

The intervention, in turn, has presented significant human rights problems, since it has been underpinned by legislation overriding the provisions of the Commonwealth *Racial Discrimination Act*. However well intentioned

the intervention might be, and it is, in the main, well-intentioned, it is difficult still to demur from the observations of the philosopher, Raimond Gaita, who has written that:

"No plausible description of the plight of the Aboriginal communities can justify the condescension shown to them and their leaders by the lack of consultation and the reckless disregard for the consequences of such dramatic but ill-prepared intervention ...

Could such disrespect be shown to any other community in this country? The answer, I believe, has to be no. If that is true, then it betrays neither cynicism nor insufficient love of country to suspect that, to a significant extent, Aborigines and their culture are still seen from a racist, denigrating perspective. From that perspective, the (sincere) concern for the children is concern for them as the children of a denigrated people, just as it was when children whom we now call the Stolen Generation were taken from their parents."³²

These are just the most publicized examples of human rights violations in this country. And as such, they do not in the least describe the full nature and extent of infringements of human rights, both great and small, experienced by many other groups and individuals.

Similar accounts may be and have been produced in relation, for example, to the plight of the elderly and their care, or the lack of it, in nursing homes and hostels; the disaster of young children inadequately defended by state systems of child protection against parental abuse, institutional neglect, child pornographers, and even perhaps, child traffickers; people of the Islamic faith denigrated by reference to terrorist acts in relation to which they have not the faintest connection; the frank neglect of people with mental illness and intellectual disability; the mistreatment of prisoners and others in detention, not least in private facilities; the continuing legal and societal discrimination against people who are gay, lesbian or trans-gendered; and the very many people in the community whose privacy is invaded by over-zealous law enforcement officials, whether public or private.

Even this list is far from comprehensive. The recent Chaney inquiry into the rights of Western Australians, for example, identified no less than 34 different examples of cases where that State's citizens' rights may have been abused. And for reasons of space we have made no comment yet upon the manifest problems that exist in securing Australians' economic and social rights: lifting Australians out of poverty, providing a good education, assuring the provision of adequate health services; tackling homelessness; attacking youth unemployment and ensuring a decent minimum standard of living for all.

A Human Rights Act cannot be a panacea in these respects. Nirvana should not be expected. But it may just provide one foundation upon which those most in need of society's respect and assistance may stake their claim.

CHAPTER 6: The Case against a Charter

In this Chapter, we state the arguments most commonly deployed in opposition to comprehensive, statutory human rights protection and subject them to review. There are five of these:

1. An Australian Human Rights Act would have the effect of shifting political power from the parliament to the judiciary, to the detriment of Australia's Westminster system of government.
2. We should favour politicians rather than judges in determining which branch of government is best suited to protect Australians' human rights.
3. A Human Rights Act would not benefit ordinary Australians. Instead, it would privilege the claims of minorities and law breakers.
4. A Human Rights Act would clog the courts with legal claims. This would benefit lawyers but very few others.
5. There is, in any case, no significant support by Australians for the adoption of a Human Rights Act.

A Shift in Political Power from Parliament to the Courts

Under Australia's Westminster system of government, parliament is designated as sovereign. Parliamentary sovereignty means, in essence, that the final say on what should be the law of the land must rest with the peoples' elected representatives. It needs to be acknowledged, however, that parliamentary sovereignty in Australia's governmental system is heavily qualified. This is because what the parliament can or cannot do is subject ultimately to the provisions of Australia's Constitution. No law passed by the parliament can transgress the Constitution's provisions. If a law does infringe the Constitution, it may be challenged and struck down by the High Court of Australia. In this sense, the High Court of Australia has always been regarded as the ultimate guardian of the Constitution.

It is worth noting, in this respect, that under the Constitution the High Court may make decisions having a huge impact upon the way in which Australia is governed. To take just one recent example, the High Court's decision in the *Workchoices* case in 2006 resulted in a massive shift of power from State governments to the Commonwealth Government. The interesting thing about this is that no complaints are raised about the ultimate power of the High Court to make such decisions under the Constitution. This is so even when it is clear that the court's decisions may have very significant implications for Australian politics and government. The question then naturally arises as to why such strong objections should be raised to the involvement of the courts in interpreting the provisions of a Human Rights Act since the severity of the political impact of decisions under this Act are dwarfed by those of the decisions of the High Court and Federal Court under our Constitution. There is a contradiction in the argument here which opponents of a Charter need to explain.

Even so, some commentators object vigorously to the prospect that the courts will bleed power from the parliament if an Australian Human Rights Act is enacted. So, the objection requires further analysis. The argument is that when interpreting the provisions of a Human Rights Act, in which fundamental rights and freedoms are expressed very generally, the courts will be making what amount to policy rather than legal decisions. But under our system of government it is desirable that policy decisions should remain clearly within the brief of the democratically elected parliament rather than being transferred to an unelected judiciary.

There are several points that may be made in response. First, we agree with the general thrust of the argument. It is for precisely that reason that a Human Rights Act, if introduced in Australia, should preserve parliamentary sovereignty. In the model sketched previously, the final decision as to what action should be taken if a federal law is incompatible with a right or freedom contained in the Human Rights Act will be taken by the parliament and not by the courts.

We do not believe that it is appropriate for Australia to adopt a constitutional charter of rights as the United States and Canada have, for example.

In those countries, the final say on what should happen if there is such an incompatibility rests with the courts. The courts may overturn the laws made by the parliament. In contrast, the proposal for an *Australian Human Rights Act* runs with the grain of Australia's Westminster system. It permits courts to declare that legislation is incompatible with the Act but leaves final decisions concerning the Act's application to our elected representatives. So, in relation to the *Human Rights Act* in Britain:

“(Parliament has made it clear that) it remains supreme and that if a statute cannot be read to be compatible with the (European) Convention a court has no power to override or set aside the statute. All the court may do, pursuant to s.4 of the Act is to declare that the statute is incompatible with the Convention. It will then be for parliament itself to decide whether it will amend the statute so that it will be compatible with the Convention. Therefore if a court declares that an Act is incompatible with the Convention, there is no question of the court being in conflict with the parliament or of seeking ... to override the will of parliament. The court is doing what the parliament has instructed it to do in s.4 of the 1998 Act.”³³

Secondly it is true, nevertheless, that the courts will accrue additional jurisdiction and power as the result of the enactment of human rights legislation. But this is to say no more than that the courts accrue additional power every time legislation is passed. The parliament makes new laws, the judiciary interprets them. That is the way our system works.

If this is the case, there must be some additional consideration, specific to human rights legislation that worries its opponents. This consideration appears to be that under legislation that sets down Australians' fundamental rights and freedoms, courts will not just be interpreting the words of a statute but, in addition, will be exercising a breadth of discretion either unusual in their work or undesirable in political practice.

It is the case that in human rights legislation of the kind proposed, the rights and freedoms to be protected are expressed in quite general terms.

The Act might say, for example, that ‘Everyone is entitled to respect for their privacy’. This formulation leaves open the question as to how ‘privacy’ is to be defined, and in what circumstances and to what extent limits upon this right may be imposed. In reality, however, the discretion vested in the courts is neither so great nor so unusual.

The international human rights treaties, upon which such legislation everywhere is based, have been in effect for many decades. Every Western democracy – except Australia – has constitutional or statutory human rights protection of precisely the same kind. In consequence, a huge jurisprudence of human rights has developed internationally and nationally. Over many decades the meaning of the rights and freedoms guaranteed has been thought about, teased out and refined by courts and tribunals across the globe including in the Westminster systems like our own – in the United Kingdom, Canada and New Zealand and throughout Europe.

Given this experience it can be expected that the judicial interpretation of the very similar provisions in an Australian Act will be very similar. The courts here, in other words, will not be taking leaps into the dark. Rather, they will be walking along judicially well-worn paths. This has certainly been the experience in Britain where the case law has very closely mirrored that of the European Court of Human Rights. This is not to say that courts will always be right. There have been examples of courts elsewhere giving provisions of an Act an unduly expansive interpretation. Equally, there have been examples of courts interpreting such provisions too narrowly. Courts make mistakes. Usually they are corrected on appeal. But the mistakes in other jurisdictions have been very much the exception rather than the rule.

Another important consideration in this respect is that courts nationally and internationally have themselves recognised that they should take a step back where matters of politics or policy are involved. In doing so, they have developed a doctrine of judicial deference. In other words, the judiciary, in recognition of the parliament’s legitimacy and expertise in these spheres, will allow the government and parliament greater leeway in determining how best to respond to certain sets of circumstances than they would where matters that are characterised as legal or jurisprudential are involved. For

example, courts properly defer to governments where assessments of threats to national security are to be made. And they shy away from intervention in cases raising broad economic or social questions.

In this respect, it needs also to be noted that courts are not unused to the interpretation of legislation containing generally framed evaluative provisions. In determining the legality of governmental action, for instance, the courts are every day required to give meaning and effect to legislative criteria such as whether the executive actions are ‘unreasonable’, or ‘improper’, or ‘procedurally unfair’ or ‘contrary to the public interest’. It is hardly possible to get legislative criteria that are broader. And yet our system of administrative law operates perfectly well with courts accorded such discretion.

The situation is similar in constitutional interpretation. The Constitution’s terms are of their nature and by necessity cast generally. Not infrequently, the High Court is required to determine whether or not some constitutional guarantee should give way in certain circumstances in the face of some ‘competing or compelling public interest’. Similarly, the court is frequently called upon to determine whether a particular law is ‘reasonably and appropriately adapted’ to the achievement of some constitutionally mandated purpose. In each of these instances, the courts proceed carefully, developing ascertainable criteria of their own, to assist in effecting the political or policy balance required. There seems to be no reason to expect that, given this experience, they will not perform a similar function under a Human Rights Act in a similarly measured and methodical way.

Politicians or Judges?

The second argument against an Australian Human Rights Act is closely related to the first. It contends that if one is to make a choice between politicians and judges as to who is best placed to protect Australians’ human rights, the decision should come down clearly in favour of politicians. There are two reasons for this. First, politicians are elected but judges are not. If politicians make mistakes, therefore, they can be replaced. Judges, in contrast, are appointed for life and cannot be removed. Secondly, politicians are more representative of the general community than judges, who are

appointed from a privileged pool. They are therefore better placed to make decisions about what rights Australians should have as they better reflect community attitudes.

While superficially plausible this argument runs immediately into significant difficulty for the following reason. Human rights, of their nature, are claims for protection against the state. They are claims for protection against laws that are oppressive and against governmental actions that are intrusive, invasive or abusive. The claim for respect for one's privacy is a legal claim that the government ought not to legislate or act in a manner that invades one's privacy, for example, by monitoring the content of peoples' phone calls or email communications.

The question then is how is this right best protected? The answer cannot be – by politicians – as they make the oppressive laws in question. Nor can it be – by bureaucrats – as they administer and enforce the legislation. Human rights can only be protected by some independent third party. And that is why claims against the government, or challenges to legislation, must necessarily be adjudicated by the courts. They are established, independently of government and parliament, for precisely such a purpose. To put the matter another way, if we were to leave the protection of human rights in the hands of politicians or bureaucrats, they would, inevitably and unavoidably, be acting as judges in their own cause.

“We cannot give effect to our democratic values without there being independent judges who hold the ring between the fight against terrorism and the constraints of the law. As long as we hold to those democratic values then the role of the court is clearly to state the legal limits. And until the state unequivocally decides, democratically, to abandon the commitment to the three principles of democracy, the rule of law and the individuals' right to personal dignity then it is the courts' role to uphold these values.”³⁴

There is another consideration that is also important in this regard. That is, that to be representative of the general community or to better reflect

community attitudes is not necessarily the best qualification to make decisions with respect to human rights. A core value underlying human rights law is that there are some human rights that are so fundamental that they ought not to be capable of infringement even when supported by popular majority. For instance, as a society we ought not to permit torture or cruel, inhuman or degrading treatment even if a majority of our fellow citizens (or a majority of our parliamentary representatives) believes that such treatment is legitimate or desirable in certain circumstances. To do so would be to transgress a value so fundamental to our society and to how we constitute ourselves as democratic peoples, that we would all be diminished as citizens as a result. In this respect, expert and independent adjudication is required.

Ordinary Australians and Minority Interests

Next it is claimed that the only people who will benefit from the introduction of a Human Rights Act are members of minority groups in society. For the vast majority of Australians, therefore, the Act will either be irrelevant or have the effect of privileging such minorities over the majority.

Here again, there is some truth in the argument. Speaking generally, those who initiate claims under a Human Rights Act are individuals and groups who feel that they have been unfairly treated by legislation or by government action. And since legislation and regulations are passed by the parliament, in accordance with the wishes of the parliamentary majority, it is unsurprising that the legislation will be challenged in individual cases by those who feel aggrieved by what the majority has done.

However, ever since the British philosopher, J.S. Mill coined the term ‘the tyranny of the majority’, it has been recognised that even in a democracy, what the majority wants is not always socially desirable. And, in particular, it has become generally accepted, for the reasons outlined in Chapter 2, that the conferral or withdrawal of individuals' human rights cannot and should not be left to parliamentary discretion alone. The bedrock values embodied in the designation and protection of human rights are too fundamental to our understanding of who we are, and what our democracy is, to be readily

overturned from one parliament to another. Everyone's human rights demand continuing respect irrespective of the political colour of the parliamentary majority existing from time to time.

This raises a further issue. It is quite inaccurate to say that human rights law exists for the protection of minorities alone. It is in the very nature of human rights that they are universal and attach to everyone. It may well be the case, although this is by no means certain, that the majority of Australians will have no cause to seek vindication of their human rights. But human rights legislation of the kind proposed here still sits as a guarantee that should some future government adopt laws or policies that infringe upon the human rights of a different segment of society, that segment, and the individuals within it, will be able to seek redress and remedy in the same way as those aggrieved now may do so.

In the end, the argument about minorities tends to boil down to an assertion that human rights legislation will be used primarily by highly unpopular and undeserving minorities, such as terrorists, criminals, prisoners, social security cheats and other assorted villains. The facts of litigation in other countries, however, do not bear this assertion out. It does appear to be the case that in the first two years or so after the introduction of human rights legislation, there is a spike in the number of challenges to criminal procedures that are brought to the courts. And terrorism cases attract enormous publicity. However, once a set of precedents has been established in that time, such cases enter into an equally steep decline. What then ensues is what one would expect: that human rights cases are brought principally in the context of complaints alleging harmful administrative decisions or actions by governmental agencies and their staff.³⁵

A Lawyers' Picnic?

Another populist criticism of human rights legislation is that it will provide a financial bonanza for lawyers. This is because lawyers, ever protective of their self-interest, will introduce human rights considerations into cases where they should not be raised, and will seek to increase their income by

launching a plethora of new legal actions, whether meritorious or not. Litigation, therefore, will increase dramatically and the winners will not be the litigants but their legal representatives.

Let us be honest about this. It may well be that some lawyers will behave in precisely this way. It is also likely that the volume of litigation will increase as the result of a Human Rights Act's introduction. Equally, however, some lawyers will take human rights cases and act pro bono because they believe that their client's rights have been transgressed. Responding to the former NSW Premier Bob Carr, who seems to be the principal advocate of the 'lawyers picnic' approach, Susan Harris Rimmer wrote recently that she agreed with Carr that human rights protection should not be about lawyers. Inevitably, however, since a Human Rights Act is one that may spawn litigation and generate judicial interpretation of its provisions, lawyers will inevitably be involved. That fact is not central, however. It is the content of cases that is important. As Rimmer wrote:

"Human rights can be about the way in which your government treats you every day. Do you feel like a person who is being treated with dignity when you go to Centrelink? What about when your parents went into an aged persons home? What about when you go? What about when you are a patient in a NSW public hospital? What about when your teenage son gets arrested for being at a protest or a nightclub that is raided? What about when the bank lends you too much money and then you can't repay? What about your access to medical treatment for cancer when you live out on a farm? What about when the government closes your local school? Or sets up a power plant next door? Or both?

Often human rights protections provide no solutions to these problems. But they offer counter-arguments and a point of view based on the dignity of the individual. The impact on the individual or the family is the first thing that gets lost when governments face hard decisions, particularly about resources."³⁶

Beyond this, however, the fact is that international experience with statutory human rights legislation simply does not bear out the worst fears of its critics. There is a significant, but not alarming, increase in court cases. And because human rights cases are usually brought by people with few resources, the field is not a particularly lucrative one for lawyers with an ambition for riches.

The 5 year review of the *Human Rights Act* in Britain concluded that a substantial body of case law had been generated but this represented no more than 2 per cent of all cases determined by the courts. The *Human Rights Act* had been considered in about one-third of cases before the nation's highest court but could be said to have affected the outcome in only one tenth.³⁷

Such figures as are available from the experience of the first year of the Victorian *Charter of Rights and Responsibilities* paint a broadly similar picture. In 2008, Victorian courts mentioned the Charter in 46 matters. Twenty-three of them were in the Supreme Court or the Court of Appeal, 20 were in the Victorian Civil and Administrative Tribunal (in a variety of Lists including discrimination, guardianship and domestic building) and 3 of them were matters heard by the Mental Health Review Board. However, in 25 of those decisions, although the judges referred to the Charter, it was not considered substantively. Furthermore, in 7 of those 25 matters, the Charter did not apply to proceedings at all. No declarations of incompatibility were issued in the first year.

This is hardly a legal or judicial revolution.

Absence of Support for a Human Rights Act

The final argument made against the adoption of a Human Rights Act is not just that there is no need for one but also that there is no demand. This is a debate, in the words of the Shadow Attorney-General Senator George Brandis, that 'we didn't have to have'.³⁸

It is no doubt the case that in many countries, the adoption of a Bill or Charter of Rights followed some major social upheaval. The examples of the US Bill of Rights, adopted as part of the American Declaration of Independ-

ence and the European Charter of Rights, following the Second World War come readily to mind. Australia has experienced no such major social unrest, although segments of Australia's indigenous community may legitimately question such a broad generalisation. Some argue, for that reason, that there is presently no reason to embark on this path. Further, some critics assert that this is not such a burning issue amongst the Australian populace as to justify contemplating such a measure. It doesn't rate highly amongst Australians' principal, political or social concerns.

The problem with this position is that the recent, independent evidence collected about Australians' attitudes towards adopting a Human Rights Act points the other way. In the last five years, four independent inquiries have been held to determine whether or not State and Territory governments should enact such laws. Every one has concluded that they should. It is instructive to look more closely at some of these findings.

In 2003, the government of the ACT commissioned an inquiry into whether or not the ACT should adopt a Human Rights Act. The inquiry concluded that:

"Human rights for people in the ACT are covered in a partial and haphazard manner under federal, territorial, common, constitutional and international law and therefore cannot be said to be adequately protected under our current political and legal system".

During the course of the inquiry, the inquiry panel conducted a deliberative poll. The polling process brought together a representative sample of ACT residents to discuss and debate the Human Rights Act proposal over two days. At the conclusion of the discussion, participants were asked to indicate their position on an Act. 58.6 per cent of participants said they favoured the adoption of such legislation. 38.4 per cent of participants said they did not.³⁹

The numbers who participated in the ACT consultation were relatively small, reflecting the size of the Territory's population. A much larger consultation was conducted in Victoria in 2006. It was a defect in the inquiry's proc-

ess that no independent polling of community opinion was conducted. Nevertheless, the inquiry panel conducted 55 public meetings across the State to assess community views. Perhaps more importantly, as the result of a vigorous program of public outreach, the inquiry received 2524 public submissions, the second highest number received by any such inquiry in Victoria's history. Of these, 84 per cent favoured the adoption of a Victorian Charter of Rights. This favourable view was held across the State in equal measure in city and country and across all other segments of the community.⁴⁰

In 2007, the Tasmanian Law Reform Institute was asked by the Tasmanian Government to inquire into whether or not Tasmania should adopt a Charter of Rights. It, too, concluded that an Act should be introduced. 403 submissions were received, the largest number ever for an inquiry of this kind. 95 per cent of public submissions expressed the view that human rights were not adequately protected in Tasmania. 383 submissions (94 per cent) indicated a preference for a statutory Charter that would apply to all arms of government – the executive, the parliament and the courts.⁴¹

The Western Australian inquiry also reported in 2007. In the course of its deliberations it conducted independent opinion polling of Western Australians' attitudes towards the adoption of human rights legislation. The results of this polling are illuminating. A random sample of 400 voters was chosen from urban and regional areas. When asked whether Western Australia should have human rights legislation 89 per cent said yes, 9 per cent said no. Young people were slightly more likely to be of this view than older people, women more slightly more likely than men to be in favour and, interestingly, country people were slightly more likely than metropolitan people to favour legal protection of human rights.

The Western Australian inquiry, to its credit, went further and conducted a survey directed at people 'on the margins', that is, members of disadvantaged groups in society. 405 participants took part in focus groups, face to face interviews, online surveys and telephone interviews. An overwhelming number supported strengthened legal human rights protections. Among face to face participants, for example, 154 of 160 were of this opinion. The inquiry panel concluded that:

"The Committee's consultations established that a wide range of people believe that their rights, or the rights of others, are not given sufficient respect and need greater protection. The breadth of individual and personal concerns was striking. Equally striking was that government agencies with responsibilities for monitoring the activities of other departments and agencies which have difficult and sensitive roles were concerned about the need for improved approaches to protecting human rights. The view that 'it ain't broke, so don't fix it', was comprehensively answered by the submissions we received from both the public and from government agencies."⁴²

Of course, none of these inquiries addressed the question as to whether a Human Rights Act should be enacted federally. There is no reason to believe, however, that public opinion in relation to that question would differ. A independent Neilsen poll conducted in February 2009 for Amnesty International, for example, found that 81 per cent of Australians now favour a national human rights charter. It seems clear that when asked, Australians express a firm view that better, comprehensive legislative protection of human rights is now necessary and desirable.

CONCLUSION

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Taking the competing arguments in the previous chapters into account, on balance we have concluded that the Commonwealth Parliament should enact an Australian Human Rights Act or Charter. This is because the case for adoption is strong and the case against, while having some merit, can reasonably be answered. Our conclusions may be summarised as follows:

1. Respect for and observance of people's fundamental human rights is critical if we are to progress as a civilised and compassionate society. The rise of the modern human rights movement from the ashes of the Holocaust and the Second World War, and the recognition of the fundamental dignity or 'personhood' of all human beings, provides a persuasive moral case for global and national human rights protection. To be effective that protection must be embodied in law and provide for adequate remedies in cases of infringement.
2. The current legal protections for Australians' human rights are patchy and inadequate. The Constitution recognises only a very limited range of rights and even these have been interpreted narrowly. Existing statute law is incomplete and is far from providing Australians with the comprehensive legal protections necessary to meet our international human rights obligations. The common law remains only the most fragile legal bastion.
3. In other Westminster countries, the introduction of Human Rights legislation has increased awareness of human rights within government and observance of human rights by government. At the same time, the relationship between the government, the parliament and the judiciary has not been altered in any significant way.
4. The case for comprehensive legal protection for human rights in Australia is strong. As in the United Kingdom and New Zealand, a Human Rights Act can be expected to increase the awareness and observance

of human rights within government. In so doing it will strengthen the accountability of the government to the parliament and the people. Human rights legislation will facilitate social inclusion and it will constitute a significant step in ensuring that breaches of human rights recently experienced in this country will not be repeated.

5. It has frequently been argued that the introduction of a Human Rights Act will undermine the delicate balance of power created under the Constitution between the executive, legislative and judicial branches of government. Neither comparable international experience nor experience within Australia supports that conclusion. The final word on the applicability of legislation transgressing human rights will remain with the Commonwealth Parliament rather than the courts. At the same time, however, the courts have a crucial role to play in the independent and impartial adjudication of human rights related disputes between the government and the governed.

Professor Conor Gearty from the University of London began life as a vigorous human rights sceptic. However, after observing the operation of the UK *Human Rights Act* in its first 8 years, he changed his mind. Explaining the change in his most recent book, Professor Gearty remarked that:⁴³

"Parliament has transferred a limited power to the courts to exercise in certain defined circumstances in a way that promotes the concept of human rights whilst protecting ... (its) untrammelled power to act that is still viewed in Britain as an essential aspect of representative democracy.

Properly understood, the Act is a brilliant reconciliation of (these) two apparent opposites which ... could be as successfully exported to other jurisdictions as the common law and civil liberties were during previous golden ages."

We agree and, on these foundations, we are persuaded that the adoption of a comparable Human Rights Act or Charter in Australia is now imperative.

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