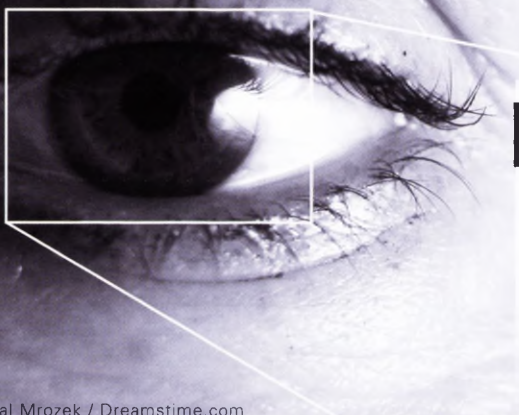


# COUNTING OUR RIGHTS



## Does Australia need a federal charter?

By Martin Roland Hill

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'In order to determine whether a country like Australia needs a Bill of Rights, we would need to compile an extraordinary balance sheet of debits and credits. The question whether human rights are adequately protected in Australia raises many issues which would be answered differently by different people.'

**C**alls for an Australian charter of rights have become louder over recent years. Yet, as Sir Anthony Mason observed in 1988, whether Australia needs a charter is a question that raises many issues, requiring an 'extraordinary' accounting of which rights are observed and which are not, how they should be observed, and how enforced.

In any discussion of this issue, it is important to consider what kind of instrument should be adopted to protect human rights. The instruments most likely to be influential – the Bill of Rights, which amended the Constitution of the USA, and the UK's *Human Rights Act 1998* – exemplify the two options: a constitutional amendment or a statute. For pragmatic purposes, as George Williams has argued, a statutory charter is more likely to be accepted federally.<sup>2</sup>

One argument regularly espoused<sup>3</sup> in favour of a charter should first be set aside. A prejudicial name for this argument could be 'the peer pressure argument', as it takes the form of 'Australia is now the only democratic country in the world that does not have a national charter of rights',<sup>4</sup> and because comparable jurisdictions have seen fit to adopt them, then Australia should. This argument can be dismissed on two grounds. Firstly, the fact that comparable jurisdictions have adopted rights instruments does not necessarily mean that Australia needs one. Secondly, it does not consider whether, if Australia does need such an instrument, whether it would be adequately supported by our current legal system.

Another common supposition is that violations occurring in Australia necessitate a charter, which further presupposes that there are actually cases of such injustice. But the 'accounting' required for any accurate assessment of the state of rights federally has thus far been piecemeal and anecdotal.

The protracted detention of Mr Al-Kateb<sup>5</sup> is often invoked by those for a charter.<sup>6</sup> Even so, Al-Kateb's case is problematic. Though Justice McHugh expressed the opinion that a Bill of Rights is desirable,<sup>7</sup> it is not clear that such a Bill or charter would have assisted Al-Kateb. Nevertheless, Mr Al-Kateb's saga is one example emerging from an immigration system which, many claim, systematically violates human rights.

Situations outside the immigration system also suggest that rights are being violated in Australia. One of the most ancient rights recognised in Anglo-Australian law is the right to a fair trial.<sup>8</sup> Yet, as Chester Porter has recently documented, the trial process has failed to protect innocent individuals.<sup>9</sup> Further, the legal recognition of the rights of certain minorities, such as the homosexual community, is a recent development<sup>10</sup> and remains in jeopardy.<sup>11</sup> The history, and current state, of Australia's Indigenous populations provide further examples.

If human rights are being violated, then attention must shift to how they are currently recognised and protected by Australian legal and governmental institutions. If this protection is inadequate, then a charter may be necessary to fill the gap or to provide further support.

AV Dicey argued that the rights of individuals, as 'general principles of the constitution', arose from, and were protected through, 'judicial decisions determining the rights of private persons in particular cases brought before the courts'.<sup>12</sup> Dicey's foundation was that the 'rule of law' was sufficient to protect the liberty of an individual. Similarly, English liberalism has long held that government has a duty to protect that same liberty.<sup>13</sup> Justice JW Shaw, considering the rule of law and a bill of rights, took the position that a 'rule of law ideology', similar to that articulated by Dicey, was significant in the early legal development of NSW.<sup>14</sup> >>



Views similar to those of Dicey were current and influential when the framers of our constitution decided that a Bill of Rights was not necessary.

In the absence of a Bill of Rights, there are two significant sources for rights in Anglo-Australian law. The first is the Commonwealth of Australia Constitution (the Constitution), the second is the Anglo-Australian common law.

The scope of the Constitution's recognition of human rights is well-analysed. Bryce, one of its earliest commentators, noted that it 'contains hardly any restrictions, in the nature of a "Bill of Rights", upon the power of the Federal Legislature over the individual citizen'.<sup>15</sup> The Constitution expressly provides for trial by jury<sup>16</sup> and freedom of religion.<sup>17</sup> It protects property rights, to a certain extent, by requiring the acquisition of property on just terms.<sup>18</sup> Further, the Constitution protects the existing state franchise,<sup>19</sup> the rights of out-of-state residents,<sup>20</sup> and freedom of interstate trade,<sup>21</sup> and provides for judicial review of federal government decisions.<sup>22</sup> Alongside these express rights, the High Court developed an interpretation of the Constitution that recognises an implied freedom of political communication.<sup>23</sup>

The Anglo-Australian common law remains an important source of protection for rights. Justice Wilmot, in his *Opinion on the Writ of Habeas Corpus* of 1758,<sup>24</sup> observed that 'the liberty of a man's person' is protected by the common law in two ways: firstly, through a common law right to 'repel force by force' and defend his liberty as he might his life; and, secondly, through regarding 'every unlawful imprisonment' as a breach of the peace that could be proceeded against by an action for false imprisonment.<sup>25</sup> The High Court has long acknowledged the rights-protecting role of the common law.<sup>26</sup> In *Coco v The Queen*,<sup>27</sup> the Court held some rights to be so fundamental that they could not be abridged without express legislative intent.<sup>28</sup> One fundamental right, recognised in *Dietrich v The Queen*,<sup>29</sup> is to have the benefit of counsel when accused of a serious crime.<sup>30</sup> But despite their significance, the common law protects few rights and is unable, despite judicial will, to expand the scope of its protection because of the constraints on its development.

Another source of protection for rights are those statutes specifically enacted to identify and protect them. Federally, the *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992*, and *Age Discrimination Act 2004* shield individuals against adverse discrimination in certain circumstances. Alongside these statutes, the *Human Rights and Equal Opportunity Act 1986* (Cth) created the Human Rights and Equal Opportunity Commission. Williams, however, has noted its inability to act to protect an individual's rights, demonstrating its limits.<sup>31</sup> Williams has also pointed to the lacuna in the present statutory scheme, particularly in relation to discrimination on the basis of religion, language, and sexuality.<sup>32</sup>

Given these difficulties with current rights protection, a better shield is needed. But before settling on a charter as the only solution, other possibilities should be considered.

Australia's obligations under international treaty law potentially provide a different basis. Australia is a party to

the most significant international human rights declarations and conventions, including the Universal Declaration of Human Rights<sup>33</sup> (Universal Declaration), the International Covenant on Civil and Political Rights<sup>34</sup> (ICCPR) and the International Covenant on Economic, Social and Cultural Rights.<sup>35</sup> Although ratified, Australia's obligations under these treaties are not automatically incorporated into Australian law. Enacting statutes to fully incorporate these obligations would provide an extensive rights framework. An additional strength of such an approach would be the breadth of international human rights jurisprudence that Australian jurists could potentially draw upon. A possible weakness is that such an enactment would resemble a charter, and would include rights, such as self-determination,<sup>36</sup> that are currently still contested.<sup>37</sup>

Adapting a federal charter means determining the rights it would recognise. This is the more complicated aspect of the process, as the rights deemed important by a society can shift over time. A notable example is the right to bear arms as part of a well-regulated militia.<sup>38</sup> Such a right was deemed necessary in the USA's early years, but whether it has a place in a modern constitution or Bill of Rights is now debatable. The process of identifying rights is made easier, however, by the sources now available.

The Universal Declaration of Human Rights (UDHR) is an obvious source of rights that could and should be recognised in an Australian charter. It emphasises individual liberty, and acknowledges a right to life;<sup>39</sup> the right to freedom of movement;<sup>40</sup> to seek asylum from persecution;<sup>41</sup> to own property;<sup>42</sup> to freedom of thought, conscience, and religion;<sup>43</sup> to freedom of expression,<sup>44</sup> and a right to education,<sup>45</sup> among others. Its international standing places an onus on Australia to incorporate those rights acknowledged by the UDHR in its charter.

The Victorian *Charter of Human Rights and Responsibilities Act 2006* (Victorian Charter) provides a model for a future federal charter.<sup>46</sup> It protects a substantial number of the rights acknowledged in the UDHR and ICCPR. In some instances, such as the right of privacy and reputation,<sup>47</sup> the Victorian Charter goes further than the UDHR.<sup>48</sup> It further provides that a 'right or freedom not included ... that arises or is recognised under any other law ... must not be taken to be abrogated or limited only because the right or freedom is not included' in the Charter.<sup>49</sup>

One strength of the Victorian Charter is the consultation process that gave rise to it.<sup>50</sup> One implication of this process has been the emphasis on those rights that the people of Victoria see as significant and worthy of protection. In this regard, the Victorian Charter, with its acknowledgement of the place of responsibilities, contains a set of rights similar to those that a federal charter should recognise.

This most basic of accounting exercises shows that Australian law protects some rights, while others go unrecognised. The current recognition and protection should be expanded, at least to those rights not recognised, and to strengthen the protection of all rights. A federal charter would recognise those rights currently unrecognised and fortify that protection. ■

**Notes:** **1** Sir Anthony Mason, 'A Bill of Rights for Australia' in Geoffrey Lindell (ed) *The Mason Papers* (2007), 213. **2** George Williams, *A Charter of Rights for Australia* (2007), 87-9. **3** Chief Justice David Malcolm, 'A Human Rights Act for Australia' (2006) 8 *University of Notre Dame Australia Law Review* 19; Simon Bronitt and Prita Jobling, 'Constitutional Protection of Rights: the Australian Exceptions' (2005) 17(3) *Legal Date*, 1. **4** *Ibid*, 16. **5** *Al-Kateb v Godwin* (2004) 219 CLR 562. **6** Williams, above n2, 11. **7** *Al-Kateb v Godwin* (2004) 219 CLR 562, 595. **8** *Magna Carta 1297* (UK) s29. **9** Chester Porter QC, *The Conviction of the Innocent* (2007). **10** Justice Michael Kirby, 'Remembering Wolfenden' (2007) 66(3) *Meanjin*, 127. **11** *Croome v Tasmania* (1997) 191 CLR 119. **12** AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1965), 195. **13** John Stuart Mill, *On Liberty* (1985). **14** Justice JW Shaw, 'The Rule of Law – and A Bill of Rights' (2003) 75(5) *Australian Quarterly*, 10. **15** James Bryce, *Studies in History and Jurisprudence* (1901), 441. **16** *Constitution* s80. **17** *Ibid*, s116. **18** *Ibid*, s51(xxxi). **19** *Ibid*, s41. **20** *Ibid*, s117. **21** *Ibid*, s92. **22** *Ibid*, s75(vi). **23** *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. **24** (1758) 97 ER 29. **25** *Opinion on the Writ of Habeas Corpus* (1758) 97 ER 29, 38. **26** Fleur Johns, 'Human Rights in the High Court of Australia 1976-2003: The Righting of Australian Law?' (2005) 33 *Federal Law Review*, 287. **27** (1994) 179 CLR 427. **28** *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason

CJ, Brennan, Gaudron, McHugh JJ). **29** (1992) 177 CLR 292. **30** *Dietrich v The Queen* (1992) 177 CLR 292, 297-298 (Mason CJ, McHugh J). **31** Williams, n2, 44. **32** *Ibid*. **33** *Universal Declaration of Human Rights*, GA Res 217 (1948). **34** Opened for signature 16 December 1966, [1980] ATS 23 (entered into force 23 March 1976). **35** Opened for signature 16 December 1966, [1976] ATS 5 (entered into force 3 January 1976). **36** *International Covenant on Civil and Political Rights* [1980] ATS 23, art 1. **37** Williams, n2, 79; Melissa Castan and David Yarrow, 'A Charter of (Some) Rights ... For Some?' (2006) 31 *Alternative Law Journal*, 132. **38** *Constitution of the United States of America*, Amendment II. **39** *Universal Declaration of Human Rights*, art 1. **40** *Ibid*, art 13. **41** *Ibid*, art 14. **42** *Ibid*, art 17. **43** *Ibid*, art 18. **44** *Ibid*, art 19. **45** *Ibid*, art 26. **46** Similarly, the *Human Rights Act 2004* (ACT). **47** *Charter of Human Rights and Responsibilities Act 2006* (Vic), s13. **48** *Universal Declaration of Human Rights*, art 12. **49** *Charter of Human Rights and Responsibilities Act 2006* (Vic), s5. **50** George Williams, 'The Victorian Charter of Human Rights and Responsibilities' (1961) 30 *Melbourne University Law Review*, 880, 885-92.

This article is an edited version of Martin Hill's winning essay in a competition organised by NSW branch of the Australian Lawyers Alliance. Email martinhill@gmail.com

# Windmills of my mind

By Andrew Stone

This is a new column about nothing in particular! In the course of legal practice, all sorts of interesting, unusual and just plain weird items float across one's desk. The idea behind this column is to share some of those oddities that every so often prove useful or illustrative. Contributions from readers would be very gratefully received.

PS: All that should be read into the title of this column is that Sir Robert Megarry thought to use 'miscellany at law' first.



## DRIVERS SHOULD SLOW FOR RUTTING MOOSE

In *Baker v Russell* [2008] NLCA 51 the Court of Appeal of Newfoundland and Labrador considered the liability of a driver who collided with a moose on the Trans Canada Highway.

Russell was driving along the highway at dusk. The road was wet, and visibility was fairly poor. He had just passed a yellow reflective moose warning sign (posted by the local highway authority) with a caption at the bottom of the sign reading '3km'.

Russell observed two moose ahead, one in the driving lane and one on the shoulder of the highway to his right. He swerved to the left and hit a third moose, which had come from the centre of the road. Russell's passenger,

Baker, was severely injured.

The trial judge found that there was no liability, as Russell had been travelling at no more than the designated speed limit – 100km/h.

The Court of Appeal reversed this decision. The moose warning sign was sufficient to put the driver on notice of the need to adjust his speed having regard to the potential hazard of moose combined with the light and road conditions. The driver had admitted at trial that he was aware of the risk of moose by the side of the roadway, especially during rutting season.

It is noted in passing that a highway engineer from the Department of Transportation gave evidence that between 1998 and 2004 there were three to four hundred highway

accidents a year in Canada involving moose!

Although there are not many moose in Australia, there is plenty of other wildlife, including kangaroos. A driver in rural areas does have a responsibility to set his or her speed according to the circumstances. On a slippery gravel road at dusk with kangaroos coming out to graze, a prudent driver would reduce speed below the maximum allowable for the roadway. Note that in *Commissioner of Main Roads v Jones* [2005] HCA 27, the High Court found no liability on the part of the Commissioner for failing to erect warning signs that might have caused a driver to slow down and avoid a collision with a wild horse. ■

Andrew Stone is a barrister from Sir James Martin Chambers in Sydney. PHONE (02) 9223 8088 EMAIL stone@sirjamesmartin.com