AUSTARLIAN BILL OF RIGHTS

George Williams

Australia is now the only democratic nation in the world without a national charter or bill of rights.

It is long past time that we redressed this and modernised our system of government by introducing an Australia-wide human rights law. We should provide the best possible protection for vulnerable groups like children and the elderly and for important values like freedom of speech.

Until recently, no Australian government had achieved a charter of rights. The breakthroughs came in the Australian Capital Territory with the Human Rights Act 2004 and Victoria with its Charter of Human Rights and Responsibilities Act 2006.

But is there a need for national reform? After all, there is rightly much to be proud of in our political freedoms and democratic institutions. The problem is that while our system of government generally works well for most Australians there are too many examples of it failing to protect the rights of the most vulnerable and disadvantaged in the community. We possess problems of law and accountability that range from restrictions on freedom of speech under sedition law to the removal of Aboriginal people as part of the Stolen Generations to the treatment of

Despite the many good things about our democracy, Australian law still routinely permits the mistreatment of people in ways that are unjust and infringe the dignity, respect and freedom to which all human beings are entitled. We should aspire to do better.

A large part of the problem lies in how human rights in Australia are uniquely dependent on the wisdom and good sense of our elected representatives. This can be an especially frail shield when any one party controls both houses of the federal or any other parliament. Without a charter of rights, freedoms can be ignored or taken away too easily. As Australians we like to assume that we have our rights, but as a matter of law we do so for only so long as they have not been taken away. While the legal system has many checks and balances to temper public power, we have no law that ensures respect for our basic freedoms.

One example of the problem from recent years is how Australia locked up children in conditions that caused many of them to become mentally ill. It seems unthinkable that this could have occurred, yet it did.

The problem was the law, which said that the detention of people seeking asylum in Australia was mandatory. That law was applied without exception, even to unaccompanied children already suffering trauma.

One of these children was five-year-old Shayan, who arrived in Australia in March 2000. Along with other members of his family he was taken to the Woomera detention centre, a facility ringed by desert in South Australia. While in detention, Shayan witnessed hunger strikes and riots, saw authorities responding with tear gas and water cannons, and watched as adult detainees harmed themselves.

By December that year, the detention centre's medical records reveal that Shayan was experiencing nightmares, sleep disturbance, bed wetting and anxiety. He would wake in the night, gripping his chest and saying, 'They are going to kill us.' He also drew pictures of fences containing himself and his family.

Three times during that year the detention centre managers strongly recommended to the government that Shayan be moved from Woomera. Despite further recommendations and psychological assessments reporting high levels of anxiety and distress, it was several months before he and his family were moved to Villawood detention centre in Sydney.

At this time, Shayan was diagnosed with post-traumatic stress disorder. During the next few months he was admitted to hospital eight times for acute trauma and, because he refused to drink, dehydration. He also became more withdrawn.

Medical staff consistently recommended that he should be removed from detention and drew a direct link between Shayan's trauma and his experiences in detention. However, it was not until August 2001 that the government transferred him into foster care. In doing so, he was separated from his parents and sister until they were released in January 2002.

Shayan was one child among many. The statistics make for grim reading. The Human Rights and Equal Opportunity Commission found that the number of children in immigration detention peaked at 1,923 in 2000–01. By the end of 2003, a child placed in detention was kept there for an average of one year, eight months and eleven days. Some children were detained for more than three years. Almost all of the detained children were found to be refugees and so were eventually released into the community.

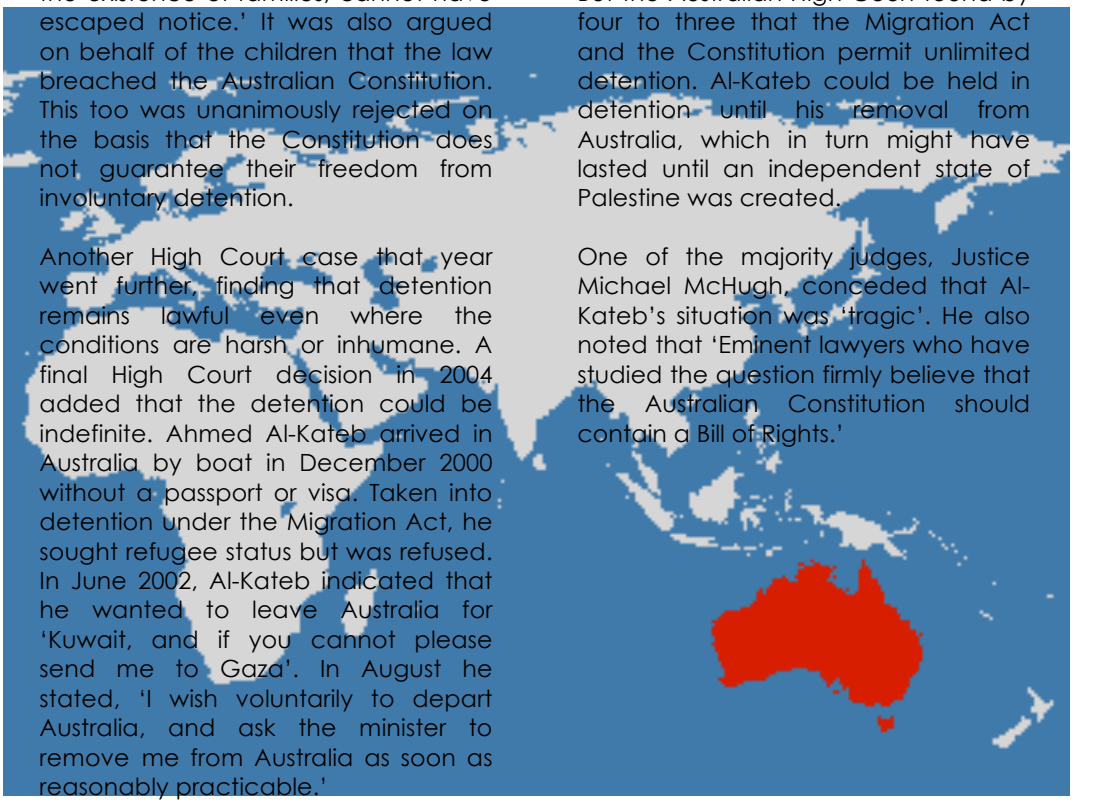
The detention of children like Shayan occurred under an Australian law introduced in 1992 by the Keating government and continued after John Howard became Prime Minister. In other nations, it would have been counter-balanced by law, called a bill of rights, charter of rights or human rights act, setting out and protecting people's fundamental human rights. In Shayan's case, this might have included the rights of children and more general rights such as freedom from arbitrary detention. By contrast, the Australian immigration law was unchecked. In fact, when it was challenged in the courts it was held to be legally unobjectionable.

The High Court of Australia ruled on the detention of children in 2004. Held in the Baxter detention centre near Port Augusta in South Australia, four children sought a court order for their release, arguing that the mandatory detention regime in the Migration Act did not apply to children. This was unanimously rejected on the basis that the Act was expressed in clear terms, with no exceptions made for children. According to Chief Justice Murray Gleeson: 'It is hardly likely that parliament overlooked the fact that some of the persons covered … would be children. Human reproduction, and the existence of families, cannot have escaped notice.' It was also argued on behalf of the children that the law breached the Australian Constitution. This too was unanimously rejected on the basis that the Constitution does not guarantee their freedom from involuntary detention.

Another High Court case that year went further, finding that detention remains lawful even where the conditions are harsh or inhumane. A final High Court decision in 2004 added that the detention could be indefinite. Ahmed Al-Kateb arrived in Australia by boat in December 2000 without a passport or visa. Taken into detention under the Migration Act, he sought refugee status but was refused. In June 2002, Al-Kateb indicated that he wanted to leave Australia for 'Kuwait, and if you cannot please send me to Gaza'. In August he stated, 'I wish voluntarily to depart Australia, and ask the minister to remove me from Australia as soon as reasonably practicable.'

Al-Kateb was born in Kuwait in 1976 of parents of Palestinian origin. Simply being born in Kuwait did not confer Kuwaiti citizenship, and the absence of a Palestinian nation left him 'stateless'. The Commonwealth sought unsuccessfully to remove him to Egypt, Jordan, Kuwait and Syria as well as to Palestinian territories (which required the cooperation of Israel). Faced with this stalemate and no foreseeable end to his detention, Al-Kateb applied to the courts for his release. In nations like the United Kingdom and the United States, judges have found that the law does not permit indefinite detention. But the Australian High Court found by four to three that the Migration Act and the Constitution permit unlimited detention. Al-Kateb could be held in detention until his removal from Australia, which in turn might have lasted until an independent state of Palestine was created.

One of the majority judges, Justice Michael McHugh, conceded that Al-Kateb's situation was 'tragic'. He also noted that 'Eminent lawyers who have studied the question firmly believe that the Australian Constitution should contain a Bill of Rights.'



But in the absence of such a law he found that 'the justice or wisdom of the course taken by the parliament is not examinable in this or any other domestic court' since 'it is not for courts … to determine whether the course taken by Parliament is unjust or contrary to basic human rights.' With these words, McHugh spelt out what it means for Australia not to have a charter or bill of rights. Without such an instrument, there may be no check on laws that violate even the most basic of human rights.

Australian law is at odds with the fundamental rights of humankind set down in the Universal Declaration of Human Rights, adopted in 1948 by the General Assembly of the newly formed United Nations. After recognising the 'inherent dignity and… the equal and inalienable rights of all members of the human family,' the declaration sets out our basic rights as 'a common standard of achievement for all peoples and all nations.'

These rights are described in a straightforward way and include that 'Everyone has the right to life, liberty and security of person' and that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

Since the Universal Declaration was adopted, other treaties and conventions have set out in more detail the basic rights of all people. The two most important are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These entered into force internationally in 1976 and were ratified for Australia by the Fraser government.

When Australia ratified the two international human rights covenants we agreed to make them part of our domestic law. While there has been action in a few areas, such as in regard to privacy and racial discrimination, the covenants have not been enacted in full by the federal parliament. This leaves us in breach of international law.

The best way to bring about an Australia charter of rights would be to honour our international commitments by passing an act through the federal Parliament to make the covenants part our of law. No change to the Constitution would be required, and there would thus be no need for a referendum. As an ordinary act of parliament, the charter could be changed over time.

An Australian charter of human rights would better protect our freedoms in the law. It would provide valuable insights for government and the community on as to how effective the law can be in protecting human rights. In doing so it will show how any law has its limits, and indeed how the law can, by itself, not fix some of the most intractable problems. This will reveal how any strategy for better human rights protection must also pay close attention to political and other forms of leadership and to community attitudes. Without reinforcement from these quarters, the positive impact of a charter will be blunted.

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