AUSTARLIAN BILL OF RIGHTS

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Australia is a wonderful country, blessed with abundant natural resources and a liberal, stable democracy.

Nevertheless, it should be absolutely clear that the laws of this country do not adequately protect human rights. Now is the time for an Australian

Some of the most egregious recent cases of human rights violation in Australia are well known. The indefinite detention of asylum seekers such as Ahmed Al-Kateb, the Cornelia Rau affair and so on have been covered extensively by the media.
However, there are also numerous, quieter violations of human rights in

A pregnant single mother, with two children, was to be evicted from public housing for no stated reason, with the near certainty of homelessness for herself and her children. Advocates used the Victorian *Charter of Human Rights and Responsibilities* to persuade her landlord to overturn this cruel and damaging decision.

Australia is now the only liberal democracy in the world that does not have some kind of national human rights statute. There are various countries whose human rights laws would not be suitable for Australia. Almost no-one in Australia suggests, for example, that we should adopt a US-style Bill of Rights.

Instead, Australia should adopt a Human Rights Act that properly responds to the values and principles that underpin our democratic system. The developing consensus favours the adoption of a Human Rights Act modelled on similar legislation in the United Kingdom, New Zealand, Victoria and the Australian Capital Territory. Those legal systems are very similar to Australia's federal system. More importantly, the operation of those laws shows very clearly that these laws can make a significant difference in enhancing the legal protection of human rights, especially for people who are disadvantaged.

Operation of an Australian Human Rights Act

But how would a Human Rights Act work? The model currently being considered would have four main elements.

First, it would be an ordinary Act of Parliament, not part of the Constitution. This would make an Australian Human Rights Act significantly different from, say, the US Bill of Rights. In particular, in the separation of powers between Parliament, the Executive and the Judiciary, Parliament would remain the 'first among equals'. This is because it would not allow the courts to invalidate legislation inconsistent with the Human Rights Act, and it would also allow Parliament to amend the Act without having a referendum.

Secondly, a Human Rights Act would require Parliament to consider how each draft law complies with human rights standards. This would not stop Parliament from passing laws that are inconsistent with human rights, as is sometimes necessary to balance competing vital interests, such as the need to combat terrorism. However, it would require MPs openly to consider whether such rights infringements are necessary. For example, the Explanatory Memorandum that preceded the *Charter of Human Rights and Responsibilities Act 2006* (Vic) states that this reporting process "increases transparency in the consideration of human rights in parliamentary procedures" for the development of new legislation.[1]

Thirdly, a Human Rights Act would set out a list of rights deemed to be especially important in Australia.

The Act would oblige all public authorities to comply with those rights. The term 'public authority' refers to public servants, government departments and agencies, and private organisations performing functions on behalf of the government.

Fourthly, a Human Rights Act would direct legislation to be interpreted consistently with the rights set out in the Act itself. To illustrate how this would work, take the leading United Kingdom case of *Ghaidan v Godin-Mendoza*,[1] which considered the interpretive provision of the *Human Rights Act 1998* (UK). In *Ghaidan*, the House of Lords was asked to interpret a provision of the *Rent Act 1977* (UK), which gave the partner of a tenant certain property rights after the tenant dies. The *Rent Act* provided for the conferral of property rights to the 'surviving spouse' of a tenant when the spouse had been living as the tenant's 'wife or husband'. The House of Lords (Lord Millett dissenting) held that the term 'spouse' extended beyond heterosexual couples, to include homosexual couples.

This interpretation allowed the *Rent Act* provision to operate consistently with the anti-discrimination principle and the right to private life in the UK's Human Rights Act.

The final element of this Human Rights Act model deals with the situation where the relevant legislation is irreconcilably inconsistent with a human right or rights.

It considers the kind of situation where, unlike in *Ghaidan*, the Parliament clearly manifests an intention to discriminate between people on, say, the ground of sexuality. In this situation, the impugned law would continue to operate. The Human Rights Act would not invalidate it. Instead, the Act would provide a mechanism to bring the human rights inconsistency to the attention of Parliament and the Government. The Government then would be required to account publicly for the inconsistency. However, Parliament would decide – at its absolute discretion – whether or not to amend the impugned law.

Responding to criticism of a Human Rights Act

The former NSW Premier Bob Carr recently wrote a piece in the *Sydney Morning Herald* in which he reiterated his opposition to an Australian Human Rights Act.[1] Nowhere does he suggest how the protection of human rights in Australia should be improved. He seems to imply that the rights enjoyed by the strongest members of our community are shared equally by all.

In the second part of this piece, I would like to respond to three of Mr Carr's central arguments.

He ignores the fact that Mr McHugh has long advocated a Human Rights Act.

Indeed, Mr McHugh – along with a panel of constitutional experts that included two former High Court judges and a number of senior members of legal practice and academia – stated clearly on 22 April 2009 that there is "no constitutional impediment" to a properly-drafted Human Rights Act.[1]

Secondly, Mr Carr fundamentally misconceives the role of the Australian Human Rights Commission under a Human Rights Act. He suggests that, under a Human Rights Act, the Commission would be given a role "in effectively striking down laws" that are incompatible with rights protected by the Act.

This suggestion is absurd. Under the Human Rights Act model now being considered, where a court finds that a law is irreconcilably inconsistent with a legally-protected right, there will be a mechanism of *notifying* Parliament of this inconsistency. Parliament would then choose, at its absolute discretion, whether to amend the law, repeal it or simply leave it as it stands. This is exactly what happens now in countries such as the UK.

Crucially, no court would be able to 'strike down' laws that are incompatible with human rights. Similarly, no executive body – be it the Human Rights Commission or some other entity – would be able to invalidate legislation for this or any other reason.

For arcane constitutional reasons, it is preferable for an executive body to act as a go-between, simply to communicate the decisions of courts

This preserves the strict separation of powers between Parliament and the Judiciary. This communication role could be performed by any executive body. Indeed, given that it involves very little discretion, the best option might be to give this role to the registry of the court itself.

Thirdly, Mr Carr warns that the particular human rights protected by law can take on a life of their own. He warns that the right to privacy "could stifle media freedom" and "a right to free association [could] wipe out trade unionism".

The problem with Mr Carr's examples is that they ignore the experience of comparable jurisdictions that have a Human Rights Act. For example, the UK has much more diverse media ownership and significantly less restrictive defamation laws than Australia, and yet it has a Human Rights Act. In fact, its defamation laws have been relaxed precisely to take account of freedom of expression. It is equally laughable to suggest that the law's protection of freedom of association in New Zealand (or Victoria or the ACT) has threatened the union movement.

The National Human Rights Consultation, chaired by Father Frank Brennan, is considering whether Australia should adopt a Human Rights Act. Over 35,000 people have made submissions, which makes this the largest public inquiry in Australian history. The vast majority of those submissions recognise that Australia needs to do more to protect human rights. In my view, the most important plank of the human rights reform process would be the passing of an Australian Human Rights Act.