Democracy in Australia – Arguments for and against a national charter of rights and responsibilities

Australia is a signatory to the Universal Declaration of Human Rights and has ratified nearly all of the conventions that stem from it. The Declaration, and the covenants and conventions associated with it, articulate the fundamental human rights of all individuals. Human rights are the freedoms and protections to which all individuals are entitled.

Human rights are breached all over the world by governments and individuals. Australians are not exempt from these violations. Human rights protection in Australia, however, suffers, in that to give force to the covenants and conventions it has signed they must be incorporated into Australian legislation. Many of the most important have not. Furthermore, Australia, alone amongst English-speaking western countries, does not have a national bill or charter of rights. In this piece, the arguments for and against the introduction of such a charter are examined.

There are two basic types of bills or charters of rights; constitutionally entrenched bills of rights and legislated bills of rights. The former are bills that are incorporated into the constitutions of the countries concerned. The latter are bills that are established by legislation and thus can be changed by parliament without the need for constitutional amendment. Examples of each type are discussed below.

Constitutionally entrenched bills of rights

In the summer of 1787, delegates from the then 13 states convened in Philadelphia and drafted the Constitution of the United States of America. The first draft set up a system of checks and balances that included a strong executive branch, a representative legislature and a federal judiciary. Over the next few years, debate continued about the absence of any statement of individual rights in the Constitution. Finally, Thomas Jefferson's arguments held sway. "A bill of rights", he said, "is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference." In 1791, a Bill of Rights, drafted by James Madison, was adopted and it, along with a further nine amendments, were incorporated into the Constitution.

The Canadian Charter of Rights and Freedoms is also a constitutionally entrenched bill of rights. It forms Part 1 of the Constitution Act of 1982. The Charter guarantees a range of rights and freedoms including fundamental freedoms, democratic rights, mobility rights, legal rights and equality rights. The Charter replaced a Bill of Rights enacted in 1960. The previous Bill of Rights was a federal statute limited in scope and without application to provincial laws. The Charter has greatly extended the range of rights protection in Canada. The Parliament retains the right to override the charter in some areas but this provision has been rarely used at national level.

Bills of human rights established by legislation

New Zealand has a Bill of Rights (1990) which is an ordinary Act of Parliament. Its provisions require that any new legislation must be reviewed to see whether it conflicts with the Bill. If it does, the Bill is given special weight in the interpretation of that conflict. The Bill also applies to the legislative, executive and judicial branches of government and prevents them from exercising their discretion in a way that is in conflict with the Bill. The Bill itself does not provide a means of resolving conflict; the courts in New Zealand hear and resolve claims of breaches of it.

Great Britain has the United Kingdom Human Rights Act (1998). This legislation enacted in domestic law the human rights obligations of the UK under the European Convention of Human Rights. Like the New Zealand Bill, it is an ordinary act of Parliament. The Act obliges public authorities to act in ways that do not conflict with the rights of individuals under the Convention. It requires new legislation to be compatible with the Convention rights, and existing legislation to be interpreted consistently with

Convention rights where possible. It gives a joint parliamentary committee the responsibility for scrutinising bills to ensure that they are compatible with the Human Rights Act, and it gives courts the responsibility of making a declaration if they find a conflict between other legislation and the Human Rights Act. The Parliament is then responsible for resolving the conflict.

The UK Human Rights Act was subject to a review in 2006, which found that it had not altered the constitutional balance of power between the parliament, executive and the courts, but had been influential in improving policy and services to individuals. The review found that the Act had not had an impact on criminal law nor the government's effort to prevent crime.

If a new national bill or rights were to be introduced in Australia should it be constitutionally entrenched or legislated?

There are several reasons why Australia might find it inappropriate to seek to introduce a constitutionally entrenched bill of rights. The first reason is simply practicality. An amendment to the Australian Constitution to include a bill of rights would require a referendum. Change through referendums is notoriously difficult to achieve in Australia since it requires a majority vote nationally, as well as majorities in a majority of states. Out of forty-four proposals to amend the Constitution only eight have ever been approved.

A more substantial argument against a constitutionally entrenched bill of rights is its inflexibility. Desirable small refinements of the bill or charter would be very difficult to make. Over time, too, circumstances change and provisions appropriate to one period and set of conditions may become inappropriate for another. The most famous example of such an anachronism is the 'right to bear arms' in the American Constitution. Widely applauded, strict gun control measures such as those introduced by the Howard Government in Australia would be nearly unthinkable in the US.

Discussions about a possible Australian national charter have therefore concentrated on the arguments for and against a legislated bill or charter of rights.

Arguments against a national charter

Spencer Zifcak and Alison King have listed arguments that have been raised against the adoption of a legislated national charter of rights in Australia. The arguments and their responses follow.

The human rights of Australians are perfectly well protected under the common law

Increasingly the body of statute law is expanding and in doing so it is replacing common law. Thus governments can pass legislation that infringes the common law human rights of Australians and visitors and those seeking to come to Australia with impunity. Discriminatory laws against Indigenous people, anti-terror laws and immigration and asylum laws are some examples.

A charter would shift power to judges and away from elected representatives

A charter along the lines of a New Zealand or UK bill does ask the courts to interpret it. This is, however, the role of the courts in all legislation, including the Constitution. When there is conflict between a charter and other legislation it has to be referred back to to Parliament. This maintains the existing balance of power between legislators and judges.

A charter would only benefit minorities and criminals

The values of the majority should include protecting minorities from discrimination. An important function of human rights legislation is to act as a guarantee that everyone will indeed enjoy fair and equal treatment.

In reference to criminal charges, Australia could probably expect implementation of a charter to be similar to the experience in Great Britain. In the period immediately following the introduction of a charter while individuals, lawyers and the courts are getting used to a new Act, its provisions might be used by lawyers in criminal cases. But once a set of precedents is established, use of a charter in this way would return to its proper place. The review of the British Human Rights Act found that it had not limited the power of the State to prosecute and prevent crime.

A charter would clog the courts with claims

Susan Harris Rimmer points out that lawyers will inevitably be involved in a charter. However, the content of the

cases is what is important - each case a lawyer brings to court will involve someone whose human rights may have been violated. The role of the legal system is to adjudicate those claims. The experience of Great Britain is that there has only been a very small increase (two per cent) in cases considered by courts.

Australians don't want a charter

Four independent inquiries have been held by State and territory Governments in Australia in the past five years, and each has recommended the introduction of a human rights charter. The ACT held a deliberative poll of residents to discuss their Human Rights Act proposal. 58.6 per cent of residents supported it and only 38.4 per cent said they did not favour it. The Victorian inquiry, which preceded the introduction of that State's Charter of Rights, received 2524 public submissions, 84 per cent of which favoured the adoption of the charter. An Amnesty International poll in February 2009 found 81 per cent of Australians favoured a national human rights charter. The 2009 National Human Rights Consultation reported that most of the submissions that it had received believed that human rights in Australia were inadequately protected and therefore needed to be supported by a national charter. A random sample of 1,200 people, however, found that those surveyed gave little thought to human rights, thinking that these rights were adequately protected.

Arguments for a National Charter

After considering the objections listed above, Zifcak and King contend that there are five core arguments in support of a charter.

A charter would improve the quality and accountability of government

A charter that clearly outlines responsibilities of Ministers, Governments, Departments and courts would help those bodies value the rights of Australians. The British experience has been that their Act has benefited the development and application of Government policy, as it has focused attention on the end result of the policy; the experience of the individual.

A charter would consolidate and strengthen human rights protections for all Australians

Currently, Australia is a signatory to many important international agreements on human rights but their enforcement in Australia has been limited. Individuals mostly rely for fair treatment on the practices of the executive and on common law provisions which can be fragile and inconsistent. Zifcak and King point out that the principles of ministerial accountability have weakened and that the power of the executive has greatly increased in recent decades. These constraints make remedying human rights breaches difficult in the absence of a charter.

A charter would encourage social inclusion

The Rudd and Gillard governments have acknowledged the need for human rights in their social inclusion policies through their emphasis on 'fairness'. A charter is an essential foundation for resolving questions of fairness, especially since those who experience unfair treatment are least able or likely to take action to remedy it.

A charter would improve Australia's international reputation

While the views of Australia's human rights record have generally been fairly positive, there has been some sharp criticism in recent years from United Nations Human Rights Treaty Committees for breaching rights Australia has agreed to uphold. Australia, however, recently secured a seat on the United Nations Security Council, even while being the only English speaking western democracy without a constitutional or legislated charter of rights.

A charter would provide the opportunity for a single response to past and current human rights violations in Australia

In the case of Behrooz, the High Court was forced to find that the imprisonment of asylum seekers for long periods of time was legal, no matter how bad the conditions of their detention. In the case of Woolley, the court could not order release of children in detention because domestic law did not recognize the children's human rights. In its Northern Territory Intervention, the Federal Government suspended provisions of the Racial Discrimination Act to apply certain rules to indigenous communities that do not apply to non-indigenous people.

Recommendations of the National Human Rights Consultation

After considering these and other arguments, the National Human Rights Consultation, an inquiry established by the Rudd Government, recommended that Australia should adopt a federal Human Rights Act and that the Act should be based on the dialogue model.

Such a model requires continuous dialogue and interaction between the legislature, the executive and the courts. If the courts find that there is evidence of any discrepancy between the Act and other legislation, such legislation would be referred back to the executive and the legislature, with the Parliament having the final say. The Consultation also recommended that declarations of incompatibility, as far as possible, should be limited to the High Court.

The Consultation Committee found strong public support for a Charter in each of its three main forms of public consultation: the submissions to the National Human Rights Consultation, the vast majority of which supported the introduction of an Act or Charter; its community round table process; and the national public opinion polls commissioned both by Amnesty International and by the Committee itself.

Government response to the recommendations of the National Human Rights Consultation

In April 2010, the Attorney-General announced the 'Human Rights Framework', the Federal Government's response to the Consultation. This framework does not include a charter of rights. In launching the Government response, the then Attorney-General Robert McClelland said that a legislative charter of rights was not included in the government's human rights framework "as the government believes that the enhancement of human rights should be done in a way that, as far as possible, unites rather than divides our community." The Chair of the Committee of the National Human Rights Consultation, Father Frank Brennan, has taken issue with the idea that a charter would be divisive. He has pointed out that the calls for a Charter or Act to protect rights came from the public in submissions and consultation. Brennan has also noted that education and an optional parliamentary review are unlikely to provide adequate protection of the human rights of Australians.

The Australia's Human Rights Framework is a package of measures to strengthen understanding and respect for human rights and a new National Human Rights Action Plan. It includes education programs for the better understanding of human rights, the establishment of a new Parliamentary Joint Committee on Human Rights to provide greater scrutiny of legislation, and the combination of existing federal anti-discrimination laws into a single Act.

On 4th January 2012, *The Human Rights (Parliamentary Scrutiny) Act 2011* came into effect. It requires all new bills and disallowable legislative instruments to be accompanied by a 'Statement of compatibility with human rights'. Statements will assess compatibility against the seven main United Nations human rights treaties to which Australia is a party. The Act also establishes a Parliamentary Joint Committee on Human Rights.

The Human Rights Framework is due for review in 2014.

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