

Day Three of Public Hearings

The Great Debate: Does Australia need a Charter of Human Rights

Summary of presentation from Edward Santow, Director, Charter of Human Rights Project, Gilbert + Tobin Centre of Public Law, and Senior Lecturer in Law, UNSW.

This debate isn't about whether human rights are a good thing; it's about something more specific. It's about whether Australia needs a Human Rights Act ("HRA"), whether this reform would make a **significant** difference in protecting human rights, and whether we can minimise any unintended consequences of such a reform.

How can a Human Rights Act protect human rights in Australia?

Opponents often say that a HRA is unnecessary because the political process fixes human rights problems when they arise. In this regard, both sides of this debate often refer to the case of the asylum seeker, Ahmed Al-Kateb. The High Court found that under Australian law Mr Al-Kateb could be detained indefinitely, without his having committed any crime. Opponents to a HRA say that the system works b/c he was eventually released (following a media campaign) by the then Immigration Minister.

But there are many problems with such an argument. First, it assumes that all such cases come to the public's attention, and thence to the attention of senior public officials. However, this Consultation has shown very clearly that the media cannot investigate every injustice, and for every person whose case is taken up by the media, there are many more whose situation remains unaddressed.

Secondly, and more fundamentally, we need to ask whether this is the way we want our government to run. Do we want vulnerable individuals to be in the position of supplicants, at the mercy of the largesse of Govt Ministers? Instead of vulnerable people asking gov officials to take pity on them, a Human Rights Act would provide a legal framework that allows individuals to *negotiate* with public servants with a view to protecting their fundamental rights. This is exactly what we are starting to see in HRA-jurisdictions such as the UK, NZ, Victoria and here in the ACT.

A Human Rights Act and democracy

The most frequently-cited argument against a HRA is the contention that it will lead to a massive shift of power from Parliament to the courts. Opponents paint a picture of power-crazed judges roaming the streets at night, picking off politicians and unwary citizens at will. Such prognostications are misleading and are not grounded in fact.

First, if they were right, then surely we would have seen these warnings come to pass in places like the UK and Victoria that have a HRA. But courts in those places simply haven't usurped parliamentary power, arrogating to themselves the final say on all matters of public importance.

Secondly, even if courts wanted to do this, they would not be legally permitted to do so. This Consultation is not considering a US-style constitutional Bill of Rights, which would allow the courts to invalidate legislation. Instead, quite correctly, Father Brennan's Committee is

considering a much more modest legislative reform, one that is nuanced to accommodate the pillars of our politico-legal system: especially, the separation of powers, parliamentary supremacy and the rule of law.

Thirdly, a HRA would enhance, not threaten, Australian democracy. The Act would emanate from Parliament, and Parliament would retain the power to amend it if the Act led to undesirable results. The Act would provide a clear set of standards against which Parliament could judge its own adherence to human rights principles. While the courts would have a role in keeping Parliament honest, but it would be a secondary role, with Parliament having the final say.

Conclusion

There is broad agreement that Australia needs to do more to protect human rights. We now know of the significant benefits of HRAs overseas and in Australia. Those jurisdictions show that we do not need to choose between legislative protection of human rights and parliamentary democracy. For those opposed to a HRA, the challenge is either to suggest ways of improving the model currently under consideration, or to come up with a better means of protecting human rights in Australia. In a liberal democracy that believes in social justice, the solution cannot be simply to do nothing.