

Australia should have a “Bill of Rights”.

It was once said that the moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; and those who are in the shadows of life - the sick, the needy and the handicapped.¹

There is clear evidence that, despite common law guarantees, fundamental human rights have been violated by successive Australian Governments. These rights have been, and currently remain unprotected by the rule of law. In fact, enacted legislation and the Constitution have been principle swords to cut them down. Would a Charter of Rights be a shield of protection? If Australia had constitutionally entrenched rights fairly representing the ideals espoused in the ICCPR², would these violations have been prevented? In considering whether Australia should adopt a Charter of Rights, it is important to consider the need for a constitutional mandate for the enforcement of fundamental human rights. The vast majority of those human rights, recognised in Australia, are embodied in legislation with few explicitly declared in the Constitution. This is in contrast to South Africa which is the most recent example of a modern constitutional guarantee of human rights.³

Fair Minded v Ageing White Males

Many argue that if Australia were to introduce a Charter of Rights, it would undermine the roles of both the legislature and the judiciary and result in a significant violation of the separation of powers⁴. There is considerable merit to this contention; that law making is best left to the legislature and not the judiciary. However, a restriction on the ability to legislate in defiance of human rights appears highly desirable in a liberal society and it is difficult to envisage why, under ordinary circumstances, a democratically elected government would wish the contrary. A review of South Africa’s Bill of Rights⁵ reveals that some rights can be

¹ Hubert H Humphrey, *Speech at the dedication of the Hubert H Humphrey building, Washington, DC, 4 November 1977*, [3-22] <<http://www.vernalproject.org/lcDQuotes/lcDQuoteA.shtml>> at 30 March 2008.

² *International Covenant on Civil and Political Rights* (1966).

³ *Constitution of the Republic of South Africa Act 108* (1996).

⁴ Michael McHugh, *Does Australia need a Bill of Rights?* <http://www.nswbar.asn.au/docs/resources/lectures/bill_rights.pdf> at 3 May 2008.

⁵ *Constitution of the Republic of South Africa Act 108* (1996), Chapter 2.

necessarily modified in exceptional circumstances. In fact, it has been argued that a Charter of Rights may reinforce the sovereignty of Parliament. As Justice Malcolm so eloquently expounded:

While much has been achieved through the development of the common law, the courts have had to pay a price for this in terms of criticisms that they have taken too much power to themselves. The guidance provided by a Bill of Rights would be one way of both assisting the courts as well as re-asserting the supremacy of Parliament.⁶

Who are our Vulnerable?

Susceptible minorities within our community are legally and economically disadvantaged and it is the weak in our society, such as children, migrants and the indigenous, that are most likely to require the protection of their human rights. UNICEF stated that '[c]hildren are particularly vulnerable and so they also have particular rights that recognize their special need for protection... They are human beings and are the subject of their own rights.'⁷

Children's Rights

Australia ratified the UN treaty of the rights of the child⁸ on 16 January 1991 but it was, not implemented by Australian statute until 22 December 1992. The prominent case of *Minister for Immigration and Ethnic Affairs v Teoh*⁹ questioned whether children's rights were protected in Australia. In 1991, Mr Teoh, a Malaysian National, was refused permanent entry into Australia due to a criminal conviction. Mr Teoh was the principle provider for seven dependent children, all of whom were Australian citizens. The Minister for Immigration and Ethnic Affairs appealed the Federal Court decision to allow Mr Teoh to stay in Australia. The High Court accepted that Australia had an obligation under the ratified but yet to be implemented, treaty¹⁰ and dismissed the Minister's appeal. Mason CJ and Deane J indicated that '[a] failure to apply a relevant principle in that the principle enshrined in art 3.1 may possibly have a counterpart in the common law as it applies to cases where the welfare of a

⁶ David Malcolm J, 'Does Australia Need a Bill of Rights?' 5(3) *Murdoch University Electronic Journal of Law* 1 - 12.

⁷ *Protecting and Realizing Childrens Rights* UNICEF <http://www.unicef.org/crc/index_protecting.html> at 1 April 2008.

⁸ *Convention on the Rights of the Child* 1990.

⁹ 183 CLR 273.

¹⁰ *Convention on the Rights of the Child* 1990.

child is a matter relevant to the determination to be made.¹¹ The *Teoh* case enforced a Human Right; that of a child¹², to access contradicting contemporary legislation¹³, on the basis of an international treaty unsupported in statute. In contrast, the South African Bill of Rights¹⁴, which is enshrined in their Constitution, provides the guarantee of inherit protection of children's rights. It states explicitly in section 28¹⁵, that a child has the right 'to parental care' and that a 'child's best interests are of paramount importance in every matter concerning the child'¹⁶. Although the rights and protection of the involved child were upheld in *Teoh*, it could not have been guaranteed that this right would have originally been upheld.

The constitutionally guaranteed right of the child in South Africa, would have provided the courts in *Teoh* with a clear and indisputable direction. The High Court may have upheld the Charter, however it was the judges' activism which provided the result, as the rights were not enforceable by statute. Despite this clear win for human rights, not all children are protected. There can be no doubting the injustices and infringements of human rights by the forcible removal of indigenous children from their families; the so-called stolen generation.

However, following the implementation of the treaty¹⁷ in Australia, children have been denied these rights as evidenced in *Bakhtiyari v Australia*¹⁸. Mr Bakhtiyari, entered Australia as a refugee from Afghanistan and, after a short period in detention, he was granted refugee status and released. His family, which included his wife and five children arrived in January 2001 as refugees and were placed in detention. Mr Bakhtiyari's visa was revoked and he was reunited with his family in custody. During their long incarceration over two years, the

¹¹ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; In the Convention on the Rights of the Child, Article 3 states:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

¹² *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; In this case, '[Mr Teoh's] ties to the family and his role in supporting his and his wife's children were the principal issues in the application'. Ibid.

¹³ Administrative Decisions (Judicial Review) Act 1977 No 59 (Cth).

¹⁴ *Constitution of the Republic of South Africa Act 108* (1996), Chapter 2.

¹⁵ *Constitution of the Republic of South Africa Act 108* (1996), Chapter 2 s28.

¹⁶ *Constitution of the Republic of South Africa Act 108* (1996), Chapter 2 s28.

¹⁷ *Convention on the Rights of the Child* 1990.

¹⁸ [2002] UNHRC CCPR/C/79D/1069/ (Unreported).

Bakhtiyari children's health suffered. Initially the UN requested their release on humanitarian grounds. This was refused and subsequently the Family Court ordered the children's release in 2003. This decision was overturned by the High Court in April 2004 and the family was deported to Pakistan in December 2004. The UN clearly identified multiple human rights violations of the Bakhtiyari children. The Charter¹⁹, implemented in 1992, proved to be utterly impotent. Section 28 of the South African Bill of Rights²⁰, would have constitutionally protected the Bakhtiyari children from these gross violations.²¹

The Original Owners, Foreigners and other Undesirables

Australia has a rich and well documented history of officially sanctioned discrimination and systematic denial of human rights to those whom the Government deems undesirable²². From the time of settlement, the colonial and British Governments demonstrated a willingness to discriminate against the indigenous aborigines. At its worst, the aborigines were considered non-persons by the fiction that was terra nullius. Until the 1967 repeal of Sections 51(xxvi) and 127 of the Constitution²³ the legal status of indigenous Australians was, to say the least, impoverished. The true history of Australia is still to be written however there are already glimpses of immense horror with evidence of attempted genocide which included the systematic slaughter of Tasmanian indigenous people.²⁴

The Original Owners

The indigenous people have suffered more than any other Australian group from the abuse of human rights. In 1934, it was held in *Tuckiar v R*²⁵ that the human rights of an indigenous

¹⁹ *Convention on the Rights of the Child* 1990.

²⁰ *Constitution of the Republic of South Africa Act 108* (1996), Chapter 2 s28.

²¹ Section 28 (1) c provides that every child has the right 'to basic nutrition, shelter, basic health care services and social services'. Furthermore in section 28 (1) g, dictates that every child should not be 'detained except as a measure of last resort... [and is treated] in a manner, and kept in conditions, that take into account of the child's age'.

²² Bruce Kercher, *An unruly child: a history of law in Australia* (1995) 3-22.

²³ *Commonwealth of Australia Constitution Act 1900* (Imp).

²⁴ R Hughes, *The Fatal Shore* (1987) pp 414-24.

²⁵ (1934) 52 CLR 335.

person were protected. Tuckiar was a tribal elder of the tribe which inhabited Woodah Island. In a widely publicised trial, Tuckiar was found guilty by the Supreme Court of the Northern Territory and sentenced to death. On appeal to the High Court, due to the grossly unfair conduct of the trial, the conviction was quashed and his discharge ordered.

More recently, the discretionary use of zero tolerance and mandatory sentencing laws has resulted in the unfair incarceration, of Aborigines for minor infringements. The Royal Commission into Aboriginal Deaths in Custody²⁶ clearly identified the discriminatory nature of these laws which resulted in the systematic persecution of indigenous people by police. The UN Human Rights Committee also criticised the legislation on the basis that it was in breach of obligations undertaken by Australia under the International Covenant on Civil and Political Rights. Unfortunately for Aborigines, whether their rights were protected or not, the final outcome was often the same. The Royal Commission into Aboriginal Deaths in Custody documented 98 individual death reports.²⁷ Tuckiar was probably killed, in Darwin, by person or persons unknown.²⁸

An understanding of the 1992 High Court case, often referred to as '*Mabo's Case*'²⁹ is also vital in exemplifying protection of indigenous rights in Australia. The case found the notion of *terra nullius*, land belonging to no-one, as 'legal fiction' effectively deeming that the radical acquisition of Australia by the Crown at colonisation in 1788 did not extinguish Aboriginal native title.

This case confronted the presiding judges to reconsider accepted concepts such as *terra nullius* and Crown sovereignty to which there were no clear precedents or applicable indigenous rights statutes to refer. Instead, to reach this ruling the majority altered legal concepts of historical events in accordance with perceived reality.³⁰

²⁶ *Royal Commission on Aboriginal Deaths in Custody*, (1991)
<<http://www.austlii.edu.au/au/special/rsjproject/rslibrary/rciadic/>> at 3 May 2008.

²⁷ *Ibid.*

²⁸ Ted Egan, *Justice all their own: the Caledon Bay and Woodah Island killings 1932-1933* / Ted Egan (1996) 188-92.

²⁹ *Mabo and Ors v Queensland (No. 2)* (1992) 175 CLR 1.

³⁰ Blackshield, T & Williams, G, 2007, '*Australian Constitutional Law and Theory*', Fourth Edition, The Federation Press, Sydney.

Similarly, the 2003 South African case of *The Alexkor Ltd v Richtersveld Community*³¹, also question indigenous land rights. In this case, the existence of a constitutionally enshrined Bill of Rights provided the judges with a degree of binding direction. Chapter 2 section 25(7) of the Constitution provides:

A person or community dispossessed of property after 19 June 1913, as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.³²

This case also required an assessment of whether radical acquisition immediately and automatically extinguished native indigenous title, however a clear, precise and definitive outcome was possible due to the application of the Bill of Rights, as opposed to an outcome entirely based on the exercise of full court discretion.

Aliens

Australian Antiterrorism Laws must be one of the most severe of the recent anti-libertarian attacks on human rights. Australia's response to the outrageous 9/11 terror attacks on American has been swift and brutal. This is despite the fact that there have been no actual attacks on Australian soil. Australia also publically supported equally repressive laws in the United States with their approval of the ongoing detention of David Hicks. It was only with extreme public pressure and an approaching election that the Australian Government softened its stand in a series of compromises that eventually resulted in Mr Hicks' release after more than five years of inhumane incarceration and deprived of almost all of his human rights.³³

The arbitrary nature of our anti-terrorism laws was illustrated in the highly publicised case of *Minister for Immigration and Citizenship v Haneef*³⁴ Dr Mohamed Haneef was implicated in a series of failed suicide attacks in the United Kingdom and detained under the Australian antiterrorist laws on 2 July 2007. He remained in custody for 12 days before being charged. He was released from custody and his visa withdrawn and was subsequently deported. The Federal Court reinstated Dr Haneef Australian Work Visa on 21 December 2007.

³¹ 2003 (12) BCLR 1301 (CC), 2003 SACLR.

³² *Constitution of the Republic of South Africa Act 108 (1996)*, Chapter 2 s25(7).

³³ Tim Bugg, 'A fair go for Hicks?' (2007) 29(1) *Bulletin (Law Society of S.A.)* 14-16.

³⁴ [2007] FCAFC 203, 136

If the plight of Dr Haneef had occurred under South African jurisdiction, the circumstances would give rise to a violation of section 35 in the South African Bill of Rights³⁵. This section states that ‘everyone who is detained...has the right to challenge the lawfulness of the detention in person before court.’ The implication of a similar law in Australia would have allowed Haneef to challenge how legitimate his detention was and been able to appear in court to dispute his detention. Under a comparable Bill of Rights, Dr Haneef would have had the right to be ‘brought before a court as soon as reasonably possible.’

However, perhaps Dr Haneef should consider himself lucky; he was arrested without charge in the only common law country without significant constitutional human rights. He was arbitrarily detained for only 12 days. He was not subject to torture and appears to have had access to competent legal counsel. Finally his rights as an alien in Australia are upheld by the legal system. The contrast with Mr Hicks is stark.

Conclusion: Should Australia have a constitutional charter of rights?

While acknowledging that the majority of Australians enjoy a privileged existence in what can still be considered a lucky country, the vulnerable within our shores are at ongoing risk of the violation of their fundamental human rights. The current raft of legislative measures, including those international charters concerning which have been ratified and implemented, have proved inadequate for those most in need of protection. The implementation of a constitutional charter of rights may not be as problematic as some would claim. A charter would have to be well crafted and considered in order to gather bipartisan support and then to overcome the almost insurmountable hurdle of a referendum. Furthermore, if it proved problematic in the future, the same process can either modify or remove such a charter. Despite the idealistic and practical impediments, a constitutional charter of rights can and should be instituted in Australia.

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³⁵ *Constitution of the Republic of South Africa Act 108 (1996), Chapter 2 s35.*

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