

## Countering the Arguments Against a Bill of Rights for Australia

It is time that Australia adopted a bill of rights. This country had an enviable and leading role in the history of human rights development post World War Two. Sadly, this progressive position has been surrendered in recent decades as we have stood still whilst other western liberal democracies have introduced statutory or constitutional bills of rights.

The arguments frequently advanced against an Australian bill of rights fall into two categories. Firstly, that Australians already enjoy world's best rights protections through the combination of constitutional, statutory and common law rights together with the Westminster parliamentary checks on executive power. Secondly, that a bill of rights will undermine democracy by empowering the judiciary to the detriment of the elected parliament.

Australian rights protections are *ad hoc*. The constitutional protections are limited by the fact that our constitution was never conceived of as a rights-based instrument. Indeed, the idea of including American style rights in our constitution was rejected on the grounds that it might lead to problems with the management of the Aboriginal and immigration questions that were prevalent at the time of drafting. Surely these objections have been overcome. Statutory protections are limited to highly specific areas such as the various anti discrimination Acts. Further, following to the Brandy's Case decision the HREOC has not become the strong statutory authority for the protection of rights that it was hoped it would become. The common law protections are well established but, as common law is inferior to statutes, are subject to easy erosion such as has occurred with the reversal of the right to silence in terrorism cases following the passage of the amendments to the ASIO Act 1979. Lastly, the notion that the parliament can alone be the guarantor of rights is flawed. Since the rise of disciplined political parties the parliament, and especially the lower house, has lost any real capacity to hold an executive in check. Today we have what has been described as an "elected dictatorship". It is claimed that the people can vote out a government with a poor rights record but the reality of elections is that the focus is invariably on issues such as the economy, which are of concern to the mainstream. Rights infringements are usually committed against the weak, the vulnerable and minorities. These groups are, almost by definition, unable to garner sufficient attention to their plight and are overlooked at elections. Indeed, such groups are often the subjects of mainstream disdain.

The experiences of Cornelia Rau, Vivian Alvarez Solon, Ahmed Al-Kateb, David Hicks and Mohammed Haneef are all vivid reminders that the *ad hoc* protections of rights in Australia is inadequate and serve to undermine the argument that Australians currently enjoy world's best rights protections.

The argument that a bill of rights will erode democracy and the sovereignty of parliament is fallacious. The type of bill of rights that is being considered is a statutory instrument. As such it is an Act of the parliament that a future parliament, not being bound by the Acts of any previous parliament can amend or indeed repeal at will. To further preserve the sovereignty of the parliament, the bill of rights should enable the judiciary to issue a declaration of incompatibility, such as is the case in the United Kingdom. There is an argument,

expressed by former High Court judge Michael McHugh that this may not conform to the requirements of the Australian Constitution, under which courts may only make judicial decisions and not issue advisory opinions. However, there is an alternative view that a declaration of incompatibility, which forces a government to reconsider an action, is a remedy to a wrong based on a set of judicable facts. The remedy being a requirement that government reappraises its previous action. If this were the case then a declaration of incompatibility would be a judicial decision and thus conform to constitutional constraints.

If it should prove to be the case that a declaration of incompatibility not be possible under the Australian Constitution then McHugh's suggestion that the bill establish a requirement that all statutes be interpreted subject to the bill of rights is a solution.

Neither declarations of incompatibility, which a parliament may ignore, or an interpretive requirement that all laws be read subject to the bill of rights is not in any way an infringement on parliamentary sovereignty or a diminution of democracy. In fact the opposite is the case. Both of the above methods open a dialogue between the judiciary and the parliament, enhancing the separation of powers and the checks and balances on both institutions. The publicity that an adverse finding would generate would reinvigorate debate, both in the community and within the parliament. This can only be a positive outcome for democracy.

One of the rights protected should be the right to freedom of speech, which is limited in Australia by the lack of adequate protections for journalists. The case of the Herald-Sun journalists Michael Harvey and Gerard McManus who were threatened with jail for not revealing their journalistic sources supports the argument that a bill of rights would enhance rather than diminish democracy by increasing accountability and transparency.

Lastly, the Australian Bill of Rights should include social and economic rights in addition to the basic rights. Including "secondary" rights such as that to an education would restore Australia's lost position in the vanguard of the development of rights. It would eclipse the UK's Human Rights Act, which merely imports the European Convention on Human Rights, which says nothing about these secondary rights, into British law.

It is time that Australia's did actually enjoy world's best rights protection and that Australia re-emerge from a being a rights laggard to being a rights leader.

Stephen King