

National Human Rights Consultation Submission

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Submission Text:

The adoption of a nation Bill of Rights (BOR) in Australia is a significant measure necessary not only to enable Australia to strengthen both its regional and international influence and reputation as a democratic, developed nation but for rights protection domestically.

Those opposed to a BOR in Australia often argue that Australia already have rights enshrined in ways beyond the scope of a BOR. However, the limited number and obscure nature of such rights, afforded protection through a poorly-defined and ad-hoc hybrid of common law and legislation, is a clear indication that a BOR would provide substantial improvement for rights protections.

The importance of rights protections through a BOR in Australia is demonstrated through the violation of rights to liberty and freedom from arbitrary detention, defined in Article 9 of the ICCPR, by the Executive. Despite the recognition by the High Court of Australia's international obligations under that charter, the overruling of common law rights and gradual decline from decisions in *Lim v Minister for Immigration* has enabled the unfettered exercise of Executive power to be upheld, permitting rights to be infringed without recourse to any defined standard.

A more recent example of arbitrary detention and deprivation of liberty is evidence in Australia's anti-terror legislation. Division 104 of the Criminal Code introduced in 2005 permits drastic restrictions on movement, association and communication. This legislation was considered by the High Court in *Thomas v Mowbray* and in parity with the decision in *Al-Kateb* the Court did not consider whether the limitations on liberty were a justifiable infringement of human rights, but merely whether they were constitutionally permissible. Despite the "safeguards" on the making of these orders, the limitations to Article 9 rights are undeniable, but their constitutional validity was upheld.

Further, although not judicially tested, Division 105 of the Criminal Code introduces preventative detention orders that permit detention where no criminal culpability has been proved by a court. This is a clear expansion of Executive powers for detention without appropriate safeguards of merits and judicial review.

A Bill of Rights could balance the tensions between the three arms of government in cases such as *Thomas v Mowbray* by establishing a grounding in clearly defined standards and a recognition of the importance of rights for all people. *Thomas v Mowbray* demonstrates the inability of the judiciary to prevent the erosion of fundamental human rights. Similar instances in countries with a BOR indicated that more adequate provisions can be afforded when courts are provided with a clearly legislated set of standards against which to evaluate the proportionality of rights infringements.

Anti-terror legislation and control orders similar to those of Division 104 and 105 in Australia made in the UK are subject to the UK Human Rights Act. The act has not impeded the government's ability to provide for the safety of the people in the UK, and permits derogable orders and non-derogable orders to be made with different standards and requirements for issue; where derogable orders contemplate restrictions on the right to liberty and non-derogable orders would not violate that right. The House of Lords considered indefinite detention of non-citizen terrorist subjects and found "executive detention is the antithesis of the right to liberty and security of the person" (*A(FC) v Secretary of State for the Home Department* [2005] 2

AC 68 at [222]).

The clear balance of security and rights measures would certainly be obtainable in Australia. A BOR would ensure parliament considered human rights issues, by requiring statements of compatibility to be tabled. Further, public authorities would be required to consider the human rights impact of their measures and policies and Courts could act as a safeguard to ensure the proportionality of rights restrictions, with reference to a clear set of standards and an articulated test of statutory interpretation.

Despite the history of permitted arbitrary detention in Australia, a BOR is a practical and effective means for affording Article 9 rights protection. The practical and policy impacts and opportunity for redress would promote social inclusion, encouraging the rule of law in Australia.

A primary concern of most who oppose a national BOR is that it will enable judges to usurp the power of elected politicians and force them to make policy decisions in determining rights violations. Unfortunately, this argument overlooks the essential suitability of the Courts for this role. Firstly, in interpreting legislation, courts define and balance issues of proportionality as a common occurrence. In this respect, courts are more than capable of interpreting and applying the terms of a human rights act and the "least restrictive means" test. Secondly, courts determine real issues and are not forced to consider the hypothetical. Lastly, a range of international precedent is available following the implementation of human rights legislation in New Zealand, Canada and the UK for consideration by the courts.

Those who oppose a BOR often do so based on the potential costs of such an act, both initially in implementation and in practice. However, the costs of any measure must be balanced against the benefits. In the case of a BOR for Australia, the implementation may indeed be difficult. However, this does not mean that Australia should not at least attempt to adopt such a symbolically and practically important measure.

The creation of any Human Rights Act in Australia and its implementation must be realistic; we should recognise from the outset that a BOR cannot redress past evils, particularly in relation to past human rights violations and Indigenous relations. However, a BOR would be a significant step for Australia, domestically and internationally. The potential difficulties and costs of implementation should not be allowed to undermine the importance of legislating rights and responsibilities in this nation in the 21st Century.

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