

THE FUTURE OF THE AUSTRALIAN BILL OF RIGHTS DEBATE

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I thank the Freilich Foundation and Professor Penelope Mathew for inviting me to give the 2010 Alice Tay lecture. It is an honour to speak at a event named after someone who made such an important contribution to the protection of human rights over so many years.

Until recently, Australia was immersed in a national debate on whether to adopt a Bill of Rights. My job is to take a step back and to assess whether, given the Rudd government's decision not to proceed with such a law, there is life yet in the idea.

I will cover:

1. A snapshot of the Bill of Rights debate to the current day.
2. Has the debate reached the end of the road?
3. If not, what might come next?

1. A SNAPSHOT OF THE DEBATE TO THE CURRENT DAY

The question of whether Australia should have a national Bill of Rights goes back to the 1890s conventions that drafted the Constitution. The framers copied many aspects of the United States Constitution, and it was only natural that they would also consider including protections from that nation's Bill of Rights.

Instead, important human rights protections were rejected by the conventions. This was in part because it was thought that such protections might interfere with laws that discriminated on the basis of race, such as laws that banned Chinese people from working on the goldfields or in certain occupations.

Rather than outlawing racial discrimination, the new 1901 Constitution contained a clause that expressly permits the Commonwealth to make laws that discriminate on the basis of race. This

clause in section 51(26) has never been removed, nor has another in section 25 that recognises that the States may disqualify people from voting on account of their race.

Not surprisingly, the Australian Bill of Rights debate began again towards the end of World War II as nations sought to come to grips with the horrors of that conflict. The question has since spanned a number of long-running battles:

- In 1944, Australians rejected a referendum proposal put by the Curtin Labor government to insert guarantees of free speech and expression and to extend to the States the guarantee of religious freedom contained in section 116 of the Constitution.
- In the 1970s, federal Parliament failed to pass the Whitlam Labor government's Human Rights Bill 1973, which would have incorporated the International Covenant on Civil and Political Rights into Australian law.
- In the 1980s, federal Parliament this failed to pass the Hawke Labor government's Australian Human Rights Bill 1985, which again sought to incorporate the International Covenant on Civil and Political Rights into Australian law.

As this timeline shows, at the time that the Rudd government was elected in 2007 every Australian federal Labor government since World War II had sought to bring about major change to national protection for human rights.

Many other attempts had also been made at the State and Territory level. The first such State attempt was not by the ALP, but the Nicklin Country Party government in Queensland in 1959. Successful outcomes were first achieved when human rights acts were enacted in the ACT in 2004 and Victoria in 2006.

It came as no surprise that the newly elected Rudd government also began down the same track. At its 2007 National Conference that formulated its election platform, Labor stated that, if elected, it would 'initiate a public inquiry about how best to recognize and protect the human rights and freedoms enjoyed by all Australians'. (I acknowledge that the words were mine and that I co-moved the motion to adopt this policy with the then shadow Attorney General.)

This promise led the Rudd government to establish the National Human Rights Consultation chaired Frank Brennan on 10 December 2008, the 60th anniversary of the Universal Declaration of Human Rights. The four-person committee included 2009 Alice Tay Lecturer Mary Kostakidis (and the others were Mick Palmer and Tammy Williams, with Philip Flood filling in for a number of meetings).

The Brennan Committee reported on 30 September 2009. Its work was based upon an exhaustive analysis of Australian and international law, and evidence from around the nation on the current level of protection for human rights, particularly the rights of vulnerable and disadvantaged members of the community

What was most surprising was just how large a response the Brennan inquiry provoked. The Committee called for submissions and received 35,014 written responses—then the largest number ever for a national consultation in Australia. In addition, about 6000 people registered to attend the 66 community roundtables, which were held in 52 locations. It also ran a Facebook page, an online forum facilitated by legal experts, focus groups, a national poll, an economic analysis of options by Allen Consulting Group, three days of public hearings in Canberra with over 60 speakers and additional meetings with parliamentarians, senior public servants, police commissioners, judges and former judges, anti-discrimination commissioners and representatives of non-government organisations.

The process was exhaustive!

Of the submissions, 32,091 discussed a human rights Act, with 87% supporting this change. Many wanted even more in the form of a constitutional bill of rights.

This mirrored opinion polls over many years. In 1997, a survey of 1505 citizens found that 72% supported a bill of rights. Similarly, in 2006 a Roy Morgan poll of 1001 voters found that 69% would be very likely or likely to support a bill of rights. A March 2009 Nielsen poll of 1000 people found 80% supported a law to protect human rights in Australia.

The Brennan committee also did its own random polling to check that what it was hearing matched the view of the broader community. Its telephone survey of 1200 people found that 57% supported a human rights act, 30% were neutral and 14% were opposed. If the neutral responses are split evenly, the result matches those of the earlier polls at a better than 70:30 split.

The Brennan Committee found Australian human rights law to be inadequate. It recommended a number of measures, including a national human rights act in a like form to that in the ACT and Victoria (that is, an ordinary Act of Parliament based on the ‘dialogue’ model adopted in the United Kingdom and New Zealand).

The Brennan report came as no surprise. It has been apparent for many years that there are major problems with human rights protection in Australia.

I saw this first hand in chairing the committee that lead Australia's first State human rights act, the Victorian Charter of Human Rights and Responsibilities. There is a remarkable consistency between what the community told us, the Brennan committee and recent inquiries in the ACT, Tasmania and Western Australia. All found that Australians want better human rights protection through improvements in education and government practice and by having a new, overarching human rights law.

The Rudd government received exactly what it had asked for in the Brennan report: a consultation that engaged the Australian community in record numbers and provided an evidence-based set of recommendations.

Unfortunately, in April 2010 the government announced that it would not act on the recommendations of its own inquiry and that it would adopt only a small number of its findings.

In particular, the Rudd government put off until at least 2014 the idea of a national human rights act. It did so on the basis that such a law would be 'divisive'. It reached this conclusion in defiance of the evidence produced by its committee that there is clear and strong community support for the idea (whether judged by submissions, random opinion polling or any other measure).

This meant that, for the time being at least, Australia would remain as the only democratic nation in the world without some form of national Bill of Rights.

Instead of a human rights act, the government introduced legislation in June into the last Parliament for a new Human Rights Framework that would:

- establish a new Parliamentary Joint Committee on Human Rights to provide greater scrutiny of legislation for compliance with our international human rights obligations; and
- require that each new Bill introduced into Parliament is accompanied by a statement of compatibility with our international human rights obligations.

The Bill to bring about this new Framework lapsed with the 2010 federal election. It is not yet clear whether the Gillard government will seek to reintroduce the changes into the new Parliament.

THE END OF THE ROAD?

The Brennan report reflected the success of the most effective campaign and largest community expression in Australia's history for better national human rights protection. Given this, it was heartbreaking for many to see the reform rejected by the federal government. It was especially disappointing given this as the fourth failed attempt since Federation in 1901 to bring about change.

This begs the question: is it time that advocates for a national Bill of Rights got the message and simply dropped the idea? Is it worthwhile to invest the tremendous energy required to once again go through another debate? In any event, are the drivers there that would enable this debate to occur again?

My view is that the national Bill of Rights debate will undoubtedly return for a fifth round. Whether it be in 2014 when the federal government has promised to review its Framework, or a later time, I have no doubt that the debate will re-emerge.

The reason for this is simple. The debate keeps re-occurring not because it represents the special pleading of any constituency, but because it reflects a range of structural and other problems within our justice system. For too many Australians, a lack of human rights is the norm rather than the exception.

Here then are four reasons why the Australian Bill of Rights debate has a future:

1. Too many cases where human rights are not protected

The Brennan report is full of examples of where human rights are routinely breached in Australia. Disturbingly, the worst abuses are often the systemic ones that receive the least media attention, and include the way that our society treats people with mental illness, the elderly in aged care, Indigenous Australians and vulnerable children.

Too often, the problem is not even one of a lack of legal protection, but that the law actually strips away a person's human rights. Examples of this include:

- The detention of children seeking asylum.
- The suspension of *Racial Discrimination Act* twice since 1996.

- Australian anti-terror laws under which, for example:
 - people can be detained and their liberty restricted under a ‘control order’ without any finding of guilt against them; and
 - non-suspects can be detained by ASIO for intelligence gathering, and can face up to five years jail if they do not co-operate or if they or a journalist publish operational information about their detention for two years.

2. Our system of government lacks the laws and processes to adequately protect human rights

Human rights protection is too often absent when rights are most under threat.

This is too often the case in our courts. High Court matters can raise fundamental questions of human rights, such as the right to liberty or freedom from racial discrimination, but find that there is nothing in our system of government that provides adequate protection for those rights.

Indeed even attempting to raise a human rights argument can be counter-productive in the High Court. Oral argument in *Plaintiff S157* an example of this.

In other cases, the lack of adequate human rights protection can lead to some appalling outcomes. Examples are:

- *Hindmarsh Island Bridge case*.
- Detention of asylum seekers (*Woolley, Behrooz and Al Kateb* in 2004).

Despite beginning with the courts, I believe that it is Parliament where a well crafted human rights act can make the most difference. Indeed, I support a charter of human rights for Australia not because I seek to transfer power to the courts (although I do see better checks and balances in this area as being desirable), but because I see it as a means to improve the workings of Parliament and its deliberations, and especially its scrutiny of executive action.

We need legal reform that drives parliamentary change when it comes to human rights, and especially the rights of people in Australia who are most marginalised and disadvantaged and whose voices are heard too rarely within Parliament.

My own thinking has changed significantly on this issue. It began when I walked into the High Court building in Canberra in early 1992. I had come straight from law school and was lucky to arrive at the beginning of the most interesting and active year in the court’s history. That year the Mabo case and early free-speech cases marked the peak of the Mason court’s impact on

Australian law and government. It was a year when the court demonstrated it could play a major role in shaping Australian democracy. As a young graduate, it seemed to me that the court had all the answers and warranted the leading role.

I no longer believe this, and indeed see the judiciary as having an often minor, largely supporting role, under an Australian charter of rights. Parliament, and also the executive, needs instead to take the lead. Why?

- The aim must be to prevent human rights violations occurring in the first place, not merely to provide remedies for their breach (hence, must get laws and policies right at first instance).
- To make the greatest difference to human rights protection the real game is not in the few cases that are reported in the media and might go to court, but in service delivery and day to day decision making by the executive.
- We must navigate the difficult pathways of partisan politics to achieve lasting results (eg, vs native title: a momentous judicial achievement that has since foundered as new laws have been passed and new judges were appointed.) The court alone could not forge a lasting political settlement. Lasting reform can often only be won by democratic engagement and political leadership.

And Parliament does need reform when it comes to protecting human rights:

- Inadequate scrutiny, especially when one side of politics controls both houses.
- Human rights not considered in a systemic and effective way. Under Senate Standing Order 24 the Senate Standing Committee for the Scrutiny of Bills is charged with reporting whether Bills and Acts: ‘trespass unduly on personal rights and liberties’. Nothing lists the extent to which government can trespass upon our core rights or what these rights are. This is ignored anyway in many key debates (eg, on some anti-terror laws).
- Human rights arguments can lack legitimacy. In the absence of a charter, human rights language and concepts can lack political and legal legitimacy in parliaments and the community. As a consequence, Australia is an example of a country where people and parliaments do not always take human rights as seriously as they should.
- Speed and volume at which new laws made. For example, one of the most contentious laws of recent times has been the 2007 NT Intervention legislation, which suspended the *Racial Discrimination Act*. It required a robust debate to get the law right (a prime function of Parliament). Instead, the *Northern Territory National Emergency Response Bill* was introduced into the House of Representatives on 7 August 2007 (first viewing that day of package of five Bills of 480 pages!). Debate on the Bill commenced at 9:02pm and Bill passed at 9:15pm. Fortunately, things were better in the Senate where there was 19 Hansard pages of debate.

3. The Rudd government's new human rights framework is not up to the task of dealing with these problems

Unfortunately, the new national human rights framework will not fix the problem.

It sets out new processes, but fails to create a set of human rights standards against which they can operate.

The result is that we have improved parliamentary processes, but no remedies or other action should those processes be ignored or fail.

This is a framework based upon self-enforcement and aspirational international standards. There are no checks and balances residing within the other arms of government should Parliament ignore these new processes.

There will also not be any legislated statement of the human rights that apply under Australian domestic law. That will also frustrate attempts at better education about human rights.

It is hard to see parliament and its committees giving human rights the weight they deserve in light of this. The framework may just be seen as a process that must be complied with, without actually leading to better and more substantial protections of human rights themselves.

Do not get me wrong, the new human rights framework is an improvement. It is just that the improvement is slight, and is directed only at parliamentary processes, and not in a way that is likely to have much of a direct impact on the human rights of those in need.

4. the evidence from like countries such as the United Kingdom demonstrates that human rights acts work

The Brennan committee put those advocating a national human rights act to the test. It asked them to provide evidence that a human rights act could actually help to alleviate the many problems that the committee had identified with the protection of human rights in Australia.

The record shows that no law is a panacea for a nation's human rights problems. Nonetheless, it is equally clear that a well-drafted law backed up by a strong commitment from government,

sufficient resources and a commitment to long-term education about human rights can make a major difference.

A number of reports demonstrate this in the United Kingdom, where a human rights act was passed in 1998. For example, the 2008 report from the British Institute of Human Rights on the impact of the UK law found ‘that the Human Rights Act is protecting vulnerable people from abuse and poor treatment in public services.’ It sets out example after example of how the Act had helped families, people in detention, the aged and others in vulnerable situations.

The 2006 Victorian Charter of Human Rights and Responsibilities has now also built up a range of positive outcomes in a short time. For example:

- Charter prevented the eviction of a single mother and her children from public housing into homelessness.
- 19-year-old woman with cerebral palsy relied on the Charter to obtain support services and case management.
- Children with autism were deemed eligible for disability support services after their advocates invoked the Charter. Led to an additional \$2.75 million in support by the Community Services Minister who said, ‘this will make a major difference to the lives of many Victorian families facing the challenge of raising a child with an autism spectrum disorder’.
- Assisted an elderly woman with brain injury to access critical medical assistance. The woman required urgent therapy to treat severe contractures of her left hand. They caused considerable pain and suffering and resulted in deterioration of her hand. Although the woman had been waiting for therapy for over three years, she was not considered a priority because she was aged over 50. If medical services were not provided, radical surgery could have been required, such as severing the tendons in her fingers or even amputation of the hand. Using the Charter, her advocates were able to gain her medical treatment.

None of these cases went to court.

The Victorian charter is also leading to systemic change. For example the Victorian Department of Human Services (the largest state government department that covers Health, Mental Health, Senior Victorians, Community Services and Housing) is:

- Revising law and policies on involuntary detention for mental illness in the *Mental Health Act 1986*.
- Changing disability housing from a directive model to one based upon participation and

personal decision making.

- Asking for people to volunteer as ambassadors in the department to educate and drive cultural and organisational change. 110 people did.

2. WHERE MIGHT THE DEBATE NOW LEAD?

I have no doubt that the Bill of Rights debate will re-emerge at the national level. It will continue to do so until the human rights problems facing Australia are dealt with by a Bill of Rights or some, as yet undiscovered, other means.

That said, the intensity of the recent debate over national human rights act will naturally mean that it may be some time before the debate returns seriously to the national agenda. If nothing else, to do so again, it will take a government willing to consider the issue. Whatever the level of community support, it is extremely difficult to have a full national debate about any topic unless our political leaders are prepared to engage in it. The media tends not to be interested in an issue unless that is the case.

I think breathing space at the national level will open room for the Bill of Rights debate to shift elsewhere. In particular, I think it will return to the States and Territories where it had been running for some years before the election of the Rudd government. The ACT and Victoria already have their own Bills of Rights, and the question now is which jurisdiction will be next.

Soon after the federal government's decision this year not to proceed with a national human rights act, Tasmanian Attorney General and Deputy Premier Lara Giddings announced that her State would move to enact its own charter of rights. She has the benefit of a community consultation that has already favoured such a law. She will now consult with the Tasmanian community one last time about the final model and draft Bill. A consultation paper is due this month, with the final Bill scheduled to be introduced into Parliament mid next year.

The Northern Territory may also soon consider such a law. Its government has renewed its push for statehood, including perhaps a constitutional convention. In dealing with a new constitution for the territory, the convention will naturally also deal with how human rights should be protected as part of that instrument.

Proponents of a Bill of Rights will also have a number of other issues to tackle before a fresh national debate. There a range of complementary campaigns and strategies that will enhance the prospects of success next time round. These include:

- working to improve Australia's existing charters of rights, and in particular to seek the inclusion of economic, social and cultural rights in the ACT law.
- working to improve Australia's anti-discrimination legislation, both so as to harmonise that legislation between the Commonwealth and the States and Territories, and to expand its reach.
- seeking to improve human rights in specific areas, such as those of Indigenous Australians, asylum seekers, children, rights in the workplace and equality for same-sex relationships through national civil union laws and ultimately same-sex marriage.
- building on the commitment of the Gillard government to hold a referendum on recognising Indigenous peoples in the Constitution by also seeking to have that referendum delete the remaining discriminatory provisions from the Constitution and to include a general freedom from racial discrimination.
- seeking to use the government's new human rights framework, if it is enacted, to hold parliament more accountable for the decisions it makes on human rights.
- continuing to catalogue examples of where the system is failing to protect basic human rights so that the stories and lessons are at hand for the review of the new human rights framework in 2014.
- investing heavily in education about human rights protection and concepts. Remarkably, in a 2006 Amnesty International Australia survey, 61% of people said they thought Australia already has a Bill of Rights. It is hard enough to win a debate about a major reform when people already assume it has been achieved, let alone when a lack of knowledge opens up avenues for misinformation and misrepresentation.

CONCLUSION

An Australian Bill of Rights is the debate that will not die. The question has been a persistent part of national discussion since World War II. The decision of the Rudd government to rule out a national human rights act in favour of a new human rights framework will not change that.

The debate will not go away because Australia has a number of persistent, deep human rights problems. Most people in the community live comfortably and without fear of their basic liberties being breached. This is not the case for many others, and the failure to treat these people with dignity and respect is what continues to drive the push for reform.

2010 has proved to be a disappointing year for advocates of an Australian Bill of Rights, despite the excellent foundation for reform provided by the Brennan report. No more could have been asked of that committee in terms of its efforts to consult with the community and to assess the

evidence, nor could more have been asked of those who have tirelessly advocated for change.

Overall, having been involved myself in this campaign since 1998, I think that advocates of reform can look back on the last 10 years with great pride. A decade ago, Australia did not have a single human rights act, nor any prospect of a national debate on the issue.

Since then, two jurisdictions have adopted such a law, and in a major national debate tens thousands of Australians have expressed a clear preference for reform. Momentum has also been built for change in other parts of Australia. This all provides a strong basis upon which the debate can continue.

ENDS

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