Human rights legislative history in Australia

This excerpt provides an historical review of the consideration of human rights legislation in Australia. It is from a report, released in September 2011, of the Scrutiny of Acts and Regulations Committee of the Victorian Parliament. The full report comprises a review of the Victorian Charter of Human Rights and Responsibilities 2006, which was Australia's second human rights act (the first was in the ACT from 1 July 2004).

The full report recommends a weakening of the Victorian Charter, with a series of recommendations, many of which begin with the words "If the Charter is retained…" The Victorian Parliament will decide in later 2011 or early 2012 whether to retain the Charter, abandon it, or re-legislate some clauses which provide watered-down rights and liberties protections.

The full SARC report, handed down on 14 September 2011, is available at http://www.parliament.vic.gov.au/sarc/article/1446 This document retains the numbering from the original SARC report:

6.1 The regimes for protecting and upholding rights and responsibilities in Australia

[594] … This section briefly reviews the various regimes that exist or have been proposed in Australia.

Human rights protections in existing laws

Common law

[595] The common law is a body of legal rules set out and developed in court decisions and originating from the same period as the Magna Carta. It includes the law of equity, a flexible set of remedies developed in England's Court of Chancery that is designed to prevent strict legal rules from operating unfairly. Although derived from English traditions, Australia's common law is now regarded as a national body of law that is separate from the common law of England and other Commonwealth countries. There is only one body of common law in Australia, but each Australian Parliament can (subject to constitutional constraints) abolish or replace any part of the common law with a statutory scheme. Many parts of the common law can be regarded as directed to upholding particular rights, such as personal security or property rights. However, there are two parts of the common law that provide general protection for a body of rights: the common law principles of statutory interpretation and the remedy of judicial review.

Statutory interpretation

[596] Australian courts and tribunals interpret statutory provisions by paying primary attention to the words themselves, their statutory context and the apparent purpose of the statutory scheme. If these matters still leave room for disputes about meaning, then courts and tribunals rely on principles derived largely from the common law that are well known to parliamentary drafters. In 1908, the High Court endorsed the following common law rule described in an English textbook:

> *One of these presumptions is that the legislature does not intend to make any alteration in the law beyond what it explicitly declares, either in express terms or by implication; or, in other words, beyond the immediate scope and*

> *object of the Statute. In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.*

While it is now common for Australian Parliaments to overturn parts of the common law, this rule still has force in Australia for those parts of the common law that set out a 'fundamental right, freedom or immunity'.

[597] In a recent, well-regarded lecture, the then Chief Justice of New South Wales (James Spigelman) described this rule as the 'common law bill of rights'. His paper listed, as instances of the broader rule, Australian court holdings identifying 'rebuttable presumptions' that Australian Parliaments do not intend:

- *To retrospectively change rights and obligations;*
- *To infringe personal liberty;*
- *To interfere with freedom of movement;*
- *To interfere with freedom of speech;*
- *To alter criminal law practices based on the principle of a fair trial;*
- *To restrict access to the courts;*
- *To permit an appeal from an acquittal;*
- *To interfere with the course of justice;*
- *To abrogate legal professional privilege;*
- *To exclude the right to claim self-incrimination;*
- *To extend the scope of a penal statute;*
- *To deny procedural fairness to persons affected by the exercise of public power;*
- *To give executive immunities a wide application;*
- *To interfere with vested property rights;*
- *To authorise the commission of a tort;*
- *To alienate property without compensation;*
- *To disregard common law protection of personal reputation; and*
- *To interfere with equality of religion.*

Chief Justice Spigelman noted that '[t]his common law bill of rights overlaps with but is not identical to, the list of human rights specified in international human rights instruments, which have been given legislative force in some jurisdictions.' For example, the common law protections for legal professional privilege and restrictions on executive privileges are not reflected in international human rights treaties, while the *ICCPR's* protections for privacy and cultural rights are not protected by the common law. The Chief Justice also noted that, as the common law continues to develop, the list may expand to cover further rights.

[598] These principles have often been relied on to resolve major disputes about the meaning of statutes in Australia. For example, in 1908, the High Court relied on 'the right of every British subject born in Australia, and whose home is in Australia, to remain in, depart from, or re-enter Australia as and when he thought fit' to rule that a federal statute barring 'immigration' unless the incoming person passes a dictation test does not apply to a person born in Australia who was

raised overseas. In 1994, the High Court ruled that a statute permitting a judge to 'authorize the use of listening devices' did not allow police officers to enter a person's home without consent to install them, citing the 'fundamental common law right' against trespass. Contemporary Australian courts now refer to the rule as the 'principle of legality', with the High Court relying on that principle this year to hold that a Queensland provision that a court hearing a Crown appeal against sentence 'may in its unfettered discretion vary the sentence' is limited to situations where the sentencing judge made an error, consistently with the common law on double jeopardy and finality of sentences. The court noted that the rule is not affected by modern statutory provisions requiring courts to prefer constructions that promote the purpose or object of statutes, because '[a]scertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory', including the principle of legality.

[599] The sole requirement of the principle of legality is that the Parliament must express itself clearly if wishes to overturn a common law right. As the High Court observed in 1994, 'curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights'.

Judicial review

[600] Under the common law, Australia's superior courts have the power to review executive actions and make orders invalidating unlawful regulations, quashing unlawful decisions, barring future unlawful acts, requiring the executive to comply with legal duties and making declarations about the lawfulness or otherwise of executive conduct. The regime for judicial review as a whole protects a number of particular rights, including the rights to a fair hearing and against a variety of arbitrary or unlawful interferences.

[601] As well, judicial review can in some instances uphold a range of human rights. By scrutinising whether executive action has gone beyond the bounds of applicable statues, judicial review can provide support to the principle of legality. For example, in 2008, the Federal Court held that regulations barring the 'annoyance' of World Youth Day participants were invalid, because the enabling legislation did not clearly state that the regulations could limit the right to freedom of expression. As well, because decisions can be reviewed on the ground that the decision-maker failed to take account of a relevant consideration or that the decision-maker failed to give notice that a decision may be contrary to a legitimate expectation, judicial review may extend to the question of whether or not a decision was contrary to a human right. For example, in 1995, the High Court overturned a deportation decision on the basis that the deportee was not warned that the decision would be made in a way that contradicted the *Convention on the Rights of the Child*.

Constitutional law

[602] Victoria's *Constitution Act 1975*, like other state Constitutions, is an ordinary statute that can be altered or repealed by a majority of members present in each House for the relevant vote. However, it also contains a number of 'entrenched' provisions that can only be changed by either a referendum, a special majority (of 60% of members of each House of Parliament) or an absolute majority (over 50% of all members, present or not). Those provisions preserve:

- the bicameral structure of the Parliament and the way it is elected;
- the existence and tenure of councils;
- the existence and jurisdiction of the Supreme Court of Victoria and the tenure of its judges;
- the independence of the Auditor-General, the Ombudsman, the Electoral Commissioner and the Director of Public Prosecutions.

[603] By contrast, Australia's federal Constitution is a statute of the Imperial Parliament that was endorsed at Australia's federation by referendum in each state. It can only be altered by a referendum that gains the support of a majority of voters and a majority of states. The federal Constitution contains a set of express rights protections. Many of these protections (with respect to voting, against deprivations of property, requiring jury trials and regulating relations between the government and religion) are limited to protections from federal laws and have been narrowly interpreted. However, the federal Constitution also prevents Victoria's Parliament from limiting the constitutional rights:

- to 'absolutely free ... intercourse' between Victoria and other states;
- against discrimination on the basis of residency;
- to freedom of political communication.

[604] As well, Chapter Three of the Constitution, which provides for a unified Australian judiciary, has been interpreted by the High Court as preserving Australians' entitlement to judicial review and appeals from some decisions by state bodies and as barring state Parliaments from giving functions to state Supreme Courts that are incompatible with their exercise of judicial power.

Statute law

[605] Most statutes could be broadly described as aimed at upholding one or more human rights. A number of Australian statutes are expressly aimed at protecting particular human rights, including:

- the *Ombudsman Act 1973*, which provides for inquiries into whether administrative action 'was unreasonable unjust oppressive or improperly discriminatory' or 'wrong'
- the *Equal Opportunity Act 2010*, which provides for legal protection against discrimination on the basis of a defined set of attributes
- the *Information Privacy Act 2000* and the *Health Records Act 2001*, which provide legal protection against government interferences in privacy
- equivalent Commonwealth legislation, which in some instances overrides contrary Victorian legislation
- the *Human Rights (Sexual Conduct) Act 1994* (Cth), which bars any acts under a law that breach art. 17 of the *ICCPR* (the right to privacy) with respect to sexual conduct between consenting adults.

Bills or Charters of Rights

[606] An alternative legal movement that is distinct from the common law and the type of Constitutions and statutes enacted in Australia is the incorporation of written lists of human rights into foundational or otherwise significant laws. Although each jurisdiction takes its own approach, there are two broad overseas models that have influenced Australian considerations of such laws.

Constitutional Bills of Rights

[607] The best known but (in Australia) least influential contemporary model is the inclusion of a list of rights in a Constitution, alongside other foundational rules regulating a nation's government. The most famous example is the United States' Bill of Rights, a series of amendments added to that country's Constitution, later augmented in the aftermath of the Civil War. Such lists of rights have since become a feature of the vast majority of national Constitutions, with South Africa the most noteworthy recent example. The most significant feature of such laws is the power of a court to declare legislation invalid if it contradicts the rights listed in the Constitution, at least in some circumstances. The role of the United States' Supreme Court in interpreting that nation's Bill of Rights has led to intense public scrutiny of its decisions and pressure for lengthy questioning of new judicial nominees. Similar attention and controversy has lately attached to the membership of the South African Constitutional Court.

Statutory human rights Charters

[608] Although many former colonies incorporated rights into their Constitutions upon or approaching independence, England and its developed colonies were an exception. Instead, a distinct approach developed in the last century, initially in Canada. The first example was the *Saskatchewan Bill of Rights Act 1947*, which was enacted as an ordinary statute and therefore could be repealed by the Saskatchewan Parliament at any time. The Saskatchewan Bill is similar to (and indeed pioneered) modern equal opportunity laws in purporting to invalidate laws that contradicted its list of rights, while permitting the Parliament to expressly preserve some laws from that effect. The model was later adopted at a national level in the *Canadian Bill of Rights Act 1960*, although its slow application by the courts led to it being superseded by Canada's adoption of a constitutional Charter in 1982. Even that constitutional model retains a key element of the statutory regime: the ability for any Canadian Parliament to declare that a law applies notwithstanding the Charter, which has been applied on a small number of occasions by several provincial Parliaments.

[609] Key examples of current statutory Bills of Rights are:

- the *New Zealand Bill of Rights Act 1990*, adopted in that country as a domestic implementation of the *ICCPR* as an alternative to a proposal to adopt a constitutional Bill of Rights
- the *Hong Kong Bill of Rights Ordinance 1991*, enacted as a prelude to Hong Kong's handover to China and now entrenched as part of the quasi-constitutional 'basic law' regulating its separate legal system within China
- the *Human Rights Act 1998* (UK), adopted as a domestic measure to avoid repeated cases against the United Kingdom in the European Court of Human Rights due to that country's accession to the *European Convention on the Protection of Human Rights and Fundamental Freedoms*.

The *Human Rights Act 2004* (ACT) and the Charter are both variations of this model.

Previous considerations of Bills or Charters of Rights in Australia

[610] The inquiry's terms of reference permit SARC to take account of relevant earlier reports and inquiries into the protection of human rights and responsibilities in Australia. The question of reforming or improving regimes for protecting and upholding rights has been considered in most Australian jurisdictions. The historical and recent consideration of human rights protection in Victoria was detailed in Chapters 1 and 2. The remaining Australian inquiries and

reports are briefly described in this section.

Commonwealth

[611] Early drafts of Australia's federal Constitution included a clause, based on the Fourteenth Amendment to the US Constitution, forbidding any state from denying 'to any person within its jurisdiction, the equal protection of laws'. However, after a proposal by the Tasmanian Legislative Assembly to add a bar on depriving 'life, liberty or property without due process of law' was rejected (by 23 votes to 19), the 1898 Constitutional Convention struck the entire clause out of the draft. Two subsequent referenda to extend the express protections in the Constitution – in 1944, to include freedom of speech and expression, and to extend religion rights to the states; and in 1988, to extend the Constitution's jury, property and religion rights to states and territories – both failed, with the latter rejected by all states and over two-thirds of the population. A proposal in the final report of the 1988 Constitutional Commission to include a new part in the Constitution similar to Canada's 1982 *Charter of Rights and Freedoms* was never acted upon.

[612] The federal Parliament has considered enacting statutory rights protection on several occasions. Following the signing of the *ICCPR*, Attorney-General Lionel Murphy introduced the Human Rights Bill 1973, which contained a provision that all Australian law that was inconsistent with a set of listed rights was without force or effect except for Acts that expressly provided otherwise. A decade later, Attorney-General Lionel Bowen introduced the Australian Human Rights Bill 1985, which contained an interpretation rule requiring constructions of Commonwealth and Territory statutes that do not conflict with the listed rights to be preferred to other constructions, as well as a provision making contrary Commonwealth legislation inoperative in some circumstances. Neither Bill passed.

[613] In 2008, the federal government commissioned a national human rights consultation. The resulting report recommended the adoption of a federal Human Rights Act based on the 'dialogue model', including provisions:

- requiring statements of compatibility for all federal Bills and legislative instruments
- empowering a federal committee to review all Bills and legislative instruments for compliance with human rights
- empowering the High Court to make a declaration of incompatibility
- requiring federal public authorities to act compatibly with and give proper consideration to human rights
- for an independent cause of action against federal public authorities for 'breach of human rights' and empowering a court to provide the 'usual suite of remedies', including damages.

In the event that a federal Human Rights Act was not adopted, the report recommended a requirement for statements of compatibility for Bills and regulations; establishment of a Joint Committee on Human Rights; amending federal administrative law to make human rights a relevant consideration in government decision-making; and amending the federal interpretation law to require interpretation consistent with rights so far as is possible consistent with the law's purpose.

[614] In response, the federal government introduced the Human Rights (Parliamentary Scrutiny) Bill 2010, which requires:

- the establishment of a Joint Committee on Human Rights, with functions to examine and report to the Parliament on Bills, Acts and legislative instruments for compatibility with human rights
- statements for Bills and legislative instruments assessing compatibility with human rights.

The Senate Committee on Legal and Constitutional Affairs recommended the Bill's passage, but made a number of recommendations relating to the definition of human rights, the processes of the Joint Committee and the content and timing of statements of compatibility. One minority report recommended inserting a new definition of human rights and omitting the requirement for statements of compatibility, arguing that there was a risk that such statements 'might be regarded as canonical, or conclusive' or pre-empt the Joint Committee's deliberations.

Australian Capital Territory

[615] The then ACT Attorney-General Terry Connolly introduced a proposal for a statutory Bill of Rights into the ACT Legislative Assembly in 1995. It contained a requirement that the Attorney-General report to the Assembly on Bills that appear to be inconsistent with human rights and an interpretation clause that required preference to be given to meanings that are consistent with a defined list of rights. The Bill did not pass.

[616] In 2002, the ACT government engaged in a community consultation. The resulting report recommended the enactment of a *Human Rights Act* aimed at creating a dialogue about rights protection between all branches of government. The report's draft Bill contained provisions for pre-enactment scrutiny and various operative clauses modelled on the *Human Rights Act 1998* (UK). The ACT government subsequently introduced a bill into the Legislative Assembly with provisions:

- requiring that interpretations consistent with human rights are to be preferred as far as possible, subject to an existing requirement to prefer interpretations that best achieve the purpose of legislation
- empowering the Supreme Court to issue declarations of incompatibility
- requiring the Attorney-General to issue compatibility statements for all government Bills
- requiring a committee nominated by the Speaker to report about human rights issues raised by all Bills.

The Bill was enacted by 9 votes to 6. Subsequently, a private members Bill protecting a defined list of 'civil responsibilities' was introduced in identical terms to the *Human Rights Act 2004* (ACT), but was defeated 5 votes to 9.

[617] In 2006, a mandatory one-year review of the *Human Rights Act 2004* (ACT), conducted by the Department of Justice and Community Safety, recommended the continuation of the Act and the dialogue model, including further explanation of the compatibility of Bills with human rights. The report also recommended strengthening the interpretation rule and examining options to require public authorities to comply with human rights and introduce a direct cause of action. The ACT Legislative Assembly subsequently amended the *Human Rights Act 2004* (ACT) to:

- replace the interpretation provision with one that is similar to Charter s. 32;
- introduce a provision for obligations for public authorities that is similar to

Charter s. 38;

- provide for claims against public authorities for contravening their obligations and empowering the Supreme Court to 'grant the relief that it considers appropriate except damages'.

In 2009, a mandatory five-year review, commissioned by the ACT government and written by Australian National University academics, recommended mild strengthening of the scrutiny and obligations regimes. The ACT government has not yet responded to that review.

New South Wales

[618] In 2001, the then NSW Attorney-General Jeff Shaw referred the question of whether or not New South Wales should enact a Bill of Rights to the Legislative Council's Standing Committee on Law and Justice. The Standing Committee declined to recommend a Bill of Rights, in statutory form or otherwise, citing the need to preserve the existing relationship between the legislature and the judiciary, as well as the legal uncertainty that would likely result from such a statute. Instead, it recommended the establishment of a parliamentary scrutiny of Bills committee and the amendment of NSW's interpretation law to 'confirm the common law position' that judges may consult international laws and treaties in the case of ambiguity in a NSW statute. A dissenting report supported these recommendations, but argued in favour of a statutory Bill of Rights.

[619] The NSW Premier at the time, Bob Carr, made a submission to the inquiry (which the Standing Committee took to be the government's position) arguing against a Bill of Rights, on the basis that it would be a fundamental shift in New South Wales's political tradition. In response to the Committee's report, the NSW government introduced a Bill converting the NSW upper House's Regulation Review Committee into a Legislation Review Committee with a scrutiny of Bills function. However, the NSW government rejected the Standing Committee's second recommendation relating to interpretation, arguing that it went beyond both the common law and the laws of other Australian jurisdictions.

Northern Territory

[620] In 1987, the Northern Territory Legislative Assembly's Select Committee on Constitutional Development raised the possibility of including rights protections in a proposed Constitution to be adopted if the Territory was granted statehood. In 1995, the same Committee canvassed options for rights protection in a discussion paper, including a statutory Bill of Rights, an entrenched statute, a non-entrenched constitutional provision and parliamentary scrutiny. However, the draft Constitution produced by the Sessional Committee did not contain a Bill of Rights, with its final report noting that its members were 'unable to agree' on the issue.

[621] The issue was further considered by the Assembly's Standing Committee on Legal and Constitutional Affairs, which noted that the issue of a Bill of Rights is likely to emerge during ongoing community consultations about statehood, including planned Constitutional Conventions in coming years. The Standing Committee identified alternatives to a Bill of Rights, including new processes for parliamentary scrutiny, and a non-binding constitutional preamble or a federal human rights law. The Standing Committee concluded that '[s]tatehood ... must be achieved before consideration of a Bill of Rights' in the Territory, noting the need for certainty in any rights legislation.

Queensland

[622] Australia's first proposal for legislative protection for rights was introduced into the Queensland Parliament by Premier Frank Nicklin in 1959, following a commitment by the Country-Liberal Party in its 1957 election campaign. The Bill (which protected rights for detainees and property holders), contained provisions invalidating contrary legislation and removing the Parliament's powers to enact contrary legislation without a referendum. The Bill lapsed with the 1960 election and, although the Country-Liberal Party was re-elected, it was not revived.

[623] In 1989, the Queensland government established an Electoral and Administrative Review Commission (EARC), whose functions included investigating matters arising out of the Fitzgerald Report. As Tony Fitzgerald QC had expressed concern about the lack of protections for civil liberties in Queensland, the EARC conducted an inquiry into a Queensland Bill of Rights. It recommended adopting a Bill of Rights and produced a draft statute, including provisions overriding earlier and subsequent statutes unless they expressly declare otherwise; provisions for reports by the Attorney-General to the Parliament on inconsistent bills; and provisions for enforcement of civil rights in courts.

[624] The question of a Queensland Bill of Rights was referred to the Parliament's Legal, Constitutional and Administrative Review Committee. Its 1998 report recommended against adopting a Bill of Rights in any form, citing concerns about the empowerment of the judiciary, legal uncertainty and costs. Instead, it produced a booklet on existing rights protection in Queensland, urged further training on legislative standards and stated its concern that mechanisms be put in place to ensure that rights and liberties of individuals are considered in the local government law-making process (as well as by-laws by Aboriginal and Torres Strait Islander councils and public university councils). These conclusions (including the recommendation against a Bill of Rights) were endorsed by the Queensland government in 1999 and 2005.

Tasmania

[625] The Tasmanian government referred the question of protecting human rights to the Tasmanian Law Reform Institute in 2006. The Institute's report recommended the enactment of a Tasmanian Charter of Human Rights, including provisions for reasoned statements of compatibility; a parliamentary human rights scrutiny committee; and obligations and interpretation rules similar to Victoria's Charter. The Institute also recommended that the Supreme Court be bound by the Charter; and that it be empowered to issue declarations of incompatibility for statutes (with a provision that the legislation becomes inoperative if the Parliament does not respond within a set period), declarations of invalidity for regulations and any remedies or reliefs that it considers appropriate for any breaches of the Charter by public authorities.

[626] In 2010, the then Attorney-General Lara Giddings announced a new community consultation to consider the experiences of the ACT and Victoria since the Institute's report. The accompanying 'directions papers' proposed a Charter that lacked the Institute's suggestions for invalidity of legislation and a free-standing remedy for Charter breaches. There has been no report from the consultation to date.

Western Australia

[627] The then Attorney-General Jim McGinty announced a community consultation on human rights in Western Australia in 2007. The announcement

was accompanied by a draft Human Rights Bill, with provisions requiring statements of compatibility and obligations, interpretation and remedy rules similar to Victoria's Charter. The resulting report endorsed the draft Bill with minor amendments, but also recommended that a parliamentary committee be given a role in scrutinising Bills for compatibility with human rights and that a mediation mechanism be created to resolve disputes between individuals and government agencies concerning human rights. The Attorney-General subsequently announced that the issue of protection for rights should be pursued at the federal rather than state level.

Summary

[628] Proposals for regimes for protecting human rights like those common in most contemporary nations have been a recurrent theme in Australia since before Federation. The issue is one that crosses party lines. For example, the first Australian Charter-like proposal was made by the Queensland Country-Liberal Party, which portrayed it as a bulwark against socialism, while former (NSW) Labor Premier Bob Carr has been one of the most outspoken contemporary opponents of such regimes, citing (among other things) their potential to hinder left-wing policies by empowering conservative courts, minor parties in upper Houses and the wealthy.
[629] The dominant theme across Australian history is that nearly all proposals for Bills of Rights have failed, whether in Cabinets, in the Parliaments or in referenda. In the last decade, all jurisdictions except South Australia gave detailed attention to this question. Of these, one state and one Territory adopted human rights laws, four states and one Territory rejected or deferred consideration of change, and the Commonwealth developed a new model whose statutory component focuses exclusively on the Parliament itself.

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