

Human rights finally take centre stage

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THE CHARTER OF RIGHTS DEBATE

ATTORNEY-GENERAL Robert McClelland wants to ask Australians whether we need a national charter of rights.

Like the recent Tasmanian community report and the imminent release of the same in Western Australia, this is the right place to start. This reform should not be imposed from the top down. It should only occur if Australians want better protection for their human rights.

The focus of a community process must be on a sound and achievable model.

We should jettison the US model and any idea of a constitutional bill of rights.

The Australian debate should instead be based on ordinary laws like the charters and human rights acts introduced in New Zealand, Britain, the Australian Capital Territory and Victoria.

A new national charter would give the leading role to parliament and the people in the scrutiny of new laws and the protection of rights. The primary role of the courts would be to interpret legislation to be consistent, so far as possible, with the intentions of parliament and the protected human rights. Where this is not possible, the courts could not strike down a law.

They would only be able to declare that -- in their view -- the law is incompatible with the charter and refer it back to parliament for consideration.

This declaration mechanism could be constructed to be valid under the Australian Constitution. However, there may still be some residual doubt to be tested in the High Court.

Whatever the outcome, this is a significant, but not essential part of a national charter of rights. As an act of parliament, the charter would not transfer sovereignty from parliament to the courts, but heighten human rights concerns within the political process.

In other words, the charter would strengthen and broaden the scope of our democratic system, not transfer key decision-making powers to the judiciary. This is in sharp contrast to the US system, whereby the US Supreme Court is able to have the last say on issues such as euthanasia.

The British Human Rights Act has been a success without giving rise to the litigation and other problems sometimes associated with the US Bill of Rights.

The impact of the British law on the courts is monitored by the Human Rights Unit

of the Department for Constitutional Affairs.

The unit has found that the act has not produced a significant rise in litigation or created a "litigation culture" of rights protection.

Similarly, an article by researcher Tom Mullen and others on the impact of the British act in the Scottish courts found that human rights arguments were raised in "a little over a quarter of 1 per cent of the total criminal court caseloads over the period of the study".

Overall, the authors concluded that "it seems clear that human rights legislation has had little effect on the volume of business in the courts". A key issue is which rights should be protected.

One option would be to include all of the rights mentioned in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

After all, Australia has ratified both covenants and has undertaken to incorporate them into our law. Another option -- the one adopted in the ACT and Victoria -- would be to begin by protecting a limited range of rights and then seek to increase the list of protected rights over time.

The best course would be to take the list of rights in the ACT and Victoria and to add in further rights that are of particular importance to those who are most in need of rights protection, such as indigenous people and people living in poverty or the disabled.

Hence, the protected freedoms might also include rights like those to housing and education.

A charter could make a real difference to the protection of human rights in Australia.

It would give legal effect to many of our basic freedoms for the first time. While Australians often wrongly assume that they have these rights, the charter would turn them into law.

Like the UN's Universal Declaration of Human Rights, a charter of rights could also have a symbolic force that promotes important values such as freedom, community responsibility and tolerance of cultural diversity.

In fact, the most important contribution a charter can make is not the benefit it brings to the small numbers of people who succeed in invoking rights in court. It is how it can help to prevent the making of bad laws and how it can be used to educate, shape attitudes and bring hope and recognition to people who are otherwise powerless.

A charter of rights could have a powerful effect on the making of new laws and on improving the accountability of governments to the people. A charter would make it more likely that human rights concerns, like freedom of speech, are raised as the law was passed rather than at some later time.

At present, problems can go unnoticed and unreported if an issue is only aired

years after the law has come into force, and the impact can be devastating. A charter would create an Australian reference point against which to examine proposed laws.

New laws would be debated in parliament and within the community not only according to how they meet international standards, but also on the basis of our own developing sense of human rights.

Even if the law were passed, the charter would enable an independent determination of whether the law breaches human rights.

In the courts, an affected person could argue for an interpretation of the law that protects rights, or even that the law is incompatible with those rights. In the latter case, a decision by the court to find that a law is incompatible would send the law back to parliament for a second look.

With the benefit of hindsight, and perhaps after the initial political debate has cooled, this could provide a crucial second chance to examine the law. This has been the experience in Britain. Its parliament has in all cases moved to fix a human rights problem once identified by a court.

An Australian charter would mark an important shift not only in the law but in politics and the development of policy. The focus would be on ensuring that fundamental principles of human rights are taken into account at the earliest stages of the development of law and policy. This recognises that the best human rights protection does not lie in court after a breach has occurred, but in ensuring that the problem does not arise in the first place.

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