

Launch of *Bills of Rights in Australia: History Politics and Law*  
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THE National Human Rights Consultation Committee which I chair has been asked by government to “seek out the diverse range of views held by the community about the protection and promotion of human rights”. Any options for change “should preserve the sovereignty of the parliament and not include a constitutionally entrenched bill of rights”. These are not slanted terms of reference. They do not preclude the “no change” option. Undoubtedly, some Australians will agree with the position already adopted by the Murdoch press that we neither need nor want any change in the form of a bill or charter of rights. Others including the authors of this new book will put contrary views, claiming that some human rights are not sufficiently protected and promoted under existing arrangements.

The task of the committee is to set out faithfully what we hear in broad-ranging consultations and to provide some assessment of options that do not violate parliamentary sovereignty. The book which we launch today is a fine primer for all Australians interested in participating in this broad ranging national consultation on rights.

Since publishing *Legislating Liberty* 10 years ago, I have been on record as opposing a constitutionally entrenched bill of rights. I have oscillated on the need or desirability of a statutory bill of rights, and remain a fence-sitter about the benefits and costs of the Victorian and ACT rights charters. So I am enjoying the opportunity to spend some months hearing from a broad cross-section of Australians, and not just from the distinguished human rights lawyers who have written this very readable book.

During the abortion debate in Victoria last year I argued that politicians, public servants and some civil libertarians showed scant regard for the Victorian Charter's right to freedom of conscience when they insisted that the new abortion law include compulsory referral of a patient by a doctor who had a conscientious objection to abortion. I thought interference with the doctor's right could not be justified because the intended purpose of the interference could be met by the state providing the patient with information about available abortion providers. There are always limits on rights. But in public debate about vexed moral issues, we are often not very good at discussing those limits. Are those limits best discussed in court or in parliament? Are there clear judicial reasons for the limits, or is it more a political gut reaction of what is fair and reasonable? The authors of this book provide a great public service in assisting the reader to think more logically about human rights and their justifiable limits in society. And of course there will never be consensus about those limits when considering morally contested issues in a pluralistic democratic society like Australia.

From the consultations that have already occurred in the ACT, Victoria, Tasmania and Western Australia (and which are described fairly and

knowledgeably in this book), we know that a majority of the community who come forward and express views about a bill of rights favour some change. The result has been the passage of human rights laws in Victoria and the ACT without any strong, broad-based community opposition. Meanwhile, in WA, where the consultation was led by Fred Chaney, once a Liberal Party minister, 50 per cent of the written submissions were in favour of a WA Human Rights Act and only 34 per cent were opposed. A public opinion survey revealed that 89 per cent of respondents believed that WA should have a law that aims to protect the human rights of people. In Tasmania, 94 per cent of submissions supported a charter of rights.

These jurisdictions have put plans on hold until the national consultation is complete, but all four indicate that the majority of Australians are not convinced all human rights are sufficiently protected and promoted. No system is perfect. Can our national processes be improved efficiently? My committee is required to “to set out the advantages and disadvantages (including social and economic costs and benefits) and an assessment of the level of community support for each option it identifies.”

From my 27 years of involvement in issues relating to human rights and civil liberties, I am convinced our existing arrangements are most under strain in three instances: when the major political parties acting in the “national interest” agree to overlook the basic rights of a powerless minority; when the government of the day controls the Senate; and when the majority of High Court judges cannot see their way clear while interpreting a statute to uphold long-treasured common-law rights and freedoms.

When parliamentary opposition is strong and when government needs to argue its case for legislation before Senate committees out of its control, there is greater opportunity for consideration of the human rights implications of proposed laws.

When the High Court insists on clear and unequivocal language from parliament before upholding laws invasive of fundamental personal liberties, there is a greater prospect that we get right the balance between personal liberty and the public interest.

Those who oppose bills of rights in any form face a novel problem. In the past, Australian judges could refer to decisions by their colleagues in Britain, Canada and New Zealand. Those jurisdictions now have their own bills of rights, with the result that their judicial decisions are less likely to be useful to judges who continue to work without the aid of a bill of rights. This judicial isolation is compounded by internal judicial fragmentation, with Victorian and ACT judges deciding cases through a bill of rights template while other judges do not.

It is these complex issues which make this book so timely and so useful. The national committee looks forward to hearing community answers to the three questions set by the Government and to discussing all options (including “do nothing”), with neither fear nor favour. The nurturing of Australian values at a time of such change requires nothing less.

Since the bikie assault at Sydney airport, governments are considering whether to introduce laws similar to the South Australian *Serious and Organised Crime (Control) Act 2008*. These laws would restrict the rights to freedom of movement, freedom of association, and freedom of

expression. Is such restriction justified in a free and democratic society? Who should decide the limits on these rights – parliament or the courts? What process should the parliamentarians or judges follow before deciding to impose such limits? Would the process and substance of a law vary significantly between Victoria and New South Wales given that Victoria has a Charter of Human Rights and Responsibilities, while New South Wales does not? These are not mere academic questions.

The National Human Rights Consultation is conducting community roundtables on these issues at 50 Australian destinations. Some participants think these decisions should be left to members of parliament who face regular election and who are privy to much information which would never be available to unelected judges. Others would prefer that these decisions be made by judges. They argue that there have been too many instances in recent times when the basic human rights of unpopular minorities have been overlooked by governments too quick to respond to alleged threats, supported by community fears which ultimately prove ill founded or less justified than first apprehended. Some participants point to policies and laws which authorised detention of children in immigration facilities, overbroad anti-terrorism laws, and the Northern Territory intervention which violates the Racial Discrimination Act. They invoke household names like Cornelia Rau, Al Kateb, and Haneef. They rightly claim that our politicians on more mature reflection (perhaps following an election) can see the wisdom of more nuanced laws and policies which are more respectful of human rights.

Though Australia is often singled out for adverse international comment because we do not have any national bill of rights, the UN Human Rights Committee last week praised us for recent changes to our migration

policies and for the national human rights consultation. One UN committee member said “such a good practice should be broadcast more loudly”. The United Kingdom which has a 10 year old Human Rights Act has just released a government green paper calling for community consultation running until after the next general election due in June 2010. The UK green paper suggests that their balance between rights and responsibilities is out of kilter and that “it may be desirable to express succinctly, in one place, the key responsibilities we all owe as members of society, ensuring a clearer understanding of them in a new, accessible constitutional document and reinforcing the imperative to observe them.”

Byrnes, Charlesworth and McKinnon have criticised the ACT and Victorian bills of rights for failing to include economic and social rights such as the rights to health, work, shelter and education. They think courts could adjudicate and apply these rights in the same way that judges determine cases on civil and political rights such as the rights of free speech and assembly. The UK government is very suspicious of such an expansion claiming that “Parliament remains the most appropriate forum for making politically sensitive decisions on resource allocation”.

Already at the community roundtables and in the 10,000 submissions received, the Australian committee is finding that debate about a statutory bill of rights is only one of the community concerns. Most participants see a case for better community education so that citizens will know their rights and responsibilities. Many think life for the vulnerable, like the aged in care and the disabled on the streets, would improve if only the culture of the public service were more attuned to human rights. Even those not wanting to recast the balance of power between judges and parliamentarians are aware that our parliaments are passing more laws -

and more complex ones every year. They wonder if there might be some better way for politicians to scrutinise their own laws against the international human rights standards to which Australia has voluntarily subscribed.

Geoffrey Robertson has arrived in town to espouse the virtues of a UK-style Human Rights Act. Retired High Court Justice Michael McHugh has done everyone a service by publishing his opinion that such a law would be unconstitutional in Australia. The recently deceased and greatly respected constitutional scholar George Winterton proposed an Australian Rights Council of retired judges to whom parliamentarians could refer suspect legislation for a human rights audit, permitting community representation before the Council. He thought this would maintain the sovereignty of parliament while providing realistic, independent scrutiny and a brake on intemperate or ill-considered law making.

Whether or not there is a national bill of rights, we need to be on our guard against laws and policies enacted in the name of the public interest but with insufficient consideration for the human rights of the minority. Bokies are never popular; some of them are mean and anti-social, and some are not. Like the rest of us, they all have human rights. Some one has to balance individual rights and public safety – rationally and accountably, for the good of us all. The authors remind us of Simone Weil’s observation that “if we know in what direction the scales of society are tilted, we must do what we can to add weight to the lighter side of the scale.” That is what this national human rights consultation is about – guaranteeing a fair go for everyone, including the bokie subject to a control order.

This book will do a power of good in helping all Australians to be better informed as we conduct the national conversation on human rights in the months ahead. I commend these three academics for giving of themselves in sharing their expertise, passion and insights with the Australian public.

The late Greg Denning once told me that it is very unbecoming to launch a book. You launch missiles and aircraft carriers. Greg said you open a book; you don't launch it. With great pleasure, I declare *Bills of Rights in Australia* open. It remains to be seen whether an Australia bill of rights is ever legislated.