

FILLING THE GAP

24/3/2009 – Tim Farhall

Late last year, the Federal Government announced a nationwide consultation to establish how Australians want their human rights protected. At first, this seems strange – we don't think of Australia as a country where human rights are under threat.

Australia is currently the only liberal democratic country in the world without any formal national protection of human rights. Contrary to popular belief, there is actually little legal protection of the human rights most of us take for granted.

To take just one example: few would deny that we should have a right to freedom of speech. Indeed, freedom of speech is something most of us already enjoy. Yet the closest thing Australia has to a right of free speech is a narrow 'right of political communication' implied into the constitution. Unless your speech fits into this tiny category, it remains almost entirely unprotected.

In practice, of course, gross abuses of human rights in Australia are thankfully rare. Nevertheless, recent years have seen a worrying trend towards reduced respect for human rights. There have been high-profile cases: think Mohammed Haneef, Cornelia Rau and Vivian Alvarez-Solon. The High Court has held that indefinite and even inhumane detention can be legal under Australian law. Australia has some of the most draconian anti-terrorism legislation in the world, with provisions reversing the onus of proof and limiting access to a lawyer. Now, the Federal Government has committed to introducing a system that would enable it to censor the internet. This sounds like the regime of a repressive dictatorship, not the country we know and love.

To make matters worse, these are only the issues that hit the headlines. Every day, vulnerable people around the country suffer indignity and disempowerment in silence.

Clearly, some form of stronger protection is necessary. However, this does not mean following the path of the United States by introducing a constitutionally entrenched bill of rights. Instead, we should follow a more moderate approach – such as that taken in Victoria and the United Kingdom – through the Federal Parliament enacting a Human Rights Act.

Protecting human rights via an ordinary act of parliament, rather than a constitutional amendment, would allow for greater flexibility. Parliament could amend the Act from time to time in line with community sentiment. This would reduce the likelihood of getting stuck with anachronistic rights in the future, and would enable a wide range of government responses to extraordinary situations.

Because parliament rather than the judiciary would have the final say, there would be no risk of the 'judicial activism' so often feared by opponents of human rights protection. Judges would be able to highlight where legislation was inconsistent with human rights, applying pressure to the government of the day, but would not have the power to strike down democratically made law.

The rights themselves – the content of the Act – could be drawn from the international instruments Australia is already a party to. Indeed, it seems astonishing that Australian law is currently at odds with the Universal Declaration of Human Rights and other conventions. A Human Rights Act would merely be giving effect to Australia's longstanding international commitments

Yet perhaps most importantly, it would represent a shift in politics and government as well as the law. Concern for basic rights would become part of every stage of the political process – from the drafting of legislation to its implementation. This would eliminate most of the situations where innocent people could find their rights infringed, and provide a remedy in the few situations where such infringements still occurred. Contrary to some expectations, experience has shown that this model of human rights protection does not spark a significant increase in litigation.

In short, a national Human Rights Act would strike a balance between protecting our human rights and preserving our democratic processes. It would provide protection to everyone – the vulnerable, ordinary and powerful alike. Ultimately, it would do little more than preserve the rights most of us already take for granted.

Respect for human rights is not a radical idea, and a Human Rights Act is not a radical proposal. Rather, it is a sensible solution to a glaring gap in Australian law. It's time that gap was filled.

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