

The high price of constitutional entrenchment

Rohan D'Souza

The debate about whether Australia should implement a Bill of Rights is very much alive, invigorated by concerns about the government's response to terrorism. In October, *New Matilda* (an online magazine and policy portal) and Malcolm Fraser launched a draft Bill of Rights at Sydney's Town Hall. This met with support from Labor's legal affairs spokesperson Nicola Roxon, who told journalists that '[w]e must work to protect the freedoms we have taken for granted in our western democracy'.

This talk is nothing new—the merits of 'constitutionalising' rights have been debated since before Federation. Today, Australia is the only Western nation without some kind of charter of rights. Last year, one Australian jurisdiction started swimming with the tide: the Australian Capital Territory's *Human Rights Act* came into force on 1 July 2004. It protects a number of civil and political rights, including the right to freedom of movement, life, liberty, privacy, equality before the law and freedom of expression.

But contrary to supporters of Bill of Rights amendments, there *are*

Rohan D'Souza, a student at the University of Melbourne, currently sits on the Federal Executive of the Australian Liberal Students' Federation.

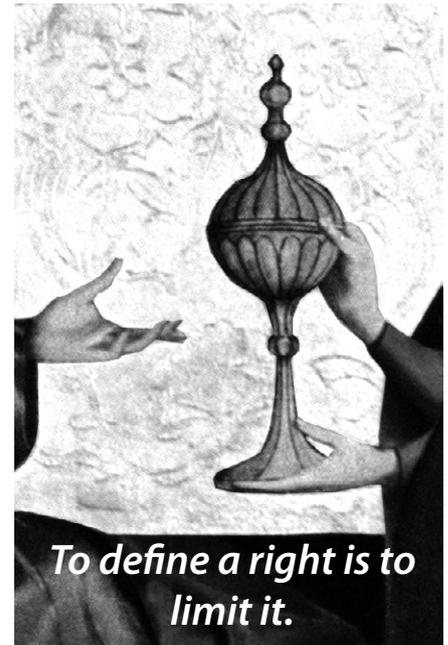
already significant current protections that operate to safeguard human rights. Constitutionalising those rights would undermine these existing safeguards and damage our democratic and liberal political system and culture.

CURRENT HUMAN RIGHTS PROTECTIONS

According to James Allan, if Australia were to adopt a bill of rights, 'it would certainly be intended to be on a confirmatory basis, to confirm and preserve the rights and freedoms already believed to exist'. This is because Australia is not plagued by endemic human rights abuses—the preponderance of Australians is well off and knows it'. Extensive human rights protections are already present, if not always explicit.

The first and most effective bulwark against the abuse of human rights is a strong democracy. This point was made by Daryl Williams (then Federal Attorney-General), who stated that 'democratic institutions are the bedrock of human rights protection in Australia'. Australia has an enviable system of representative and responsible government, which is a powerful protection against human rights abuses. Furthermore, the independence of the judiciary (already entrenched in the Constitution) helps to preserve the rule of law.

As well laying the foundations for democratic government, the Austral-



ian Constitution contains a number of specific provisions protecting rights. These include s. 116, which protects religious freedom, and s. 117, which prohibits States from discriminating against an individual on the basis that they are a resident of a different State. The High Court has also held that certain freedoms are implicit in the text and structure of the Constitution, such as the implied freedom of political communication.

The common law has also operated to protect rights, as has been seen in landmark cases such as *Dietrich* (which concerned the right to a fair trial) and *Mabo*. In addition, both State and Federal parliaments have legislated to protect human rights. At the Commonwealth level, the parliament has enacted the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* and the *Disability Discrimination Act 1992*, as well as creating the Human Rights and Equal Opportunity Commission and the office of the Federal Privacy Commissioner. While the individual merit of some of these cases and legislation may be in dispute, the capacity for the parliament and judiciary to protect both an existing and an expanding set of rights is clear.

Underlying the democratic, con-

stitutional, common law and statutory protection of human rights is a culture that respects liberty and equality. Ultimately, it is this culture that protects Australian citizens against human rights abuses. A Bill of Rights would be a hollow gesture, which, at best, would entrench the status quo. There are only a handful of countries without a charter of rights, and yet there are many nations that perpetrate gross human rights abuses. The efficacy of a statement of rights is dependent on a climate conducive to enforcement. Ironically, a Bill of Rights would be most enforceable in a nation (like Australia), where it would also be least necessary.

COURT IN THE MIDDLE— THE ROLE OF THE JUDICIARY

It is difficult to imagine a charter of rights that does not rely on the courts, at least to some extent. Obviously, the judiciary's role will vary, depending on what sort of bill of rights is implemented. For example, in the United States, if the Supreme Court finds that governmental action or legislation contravenes the Bill of Rights, that action or legislation is invalid. By contrast, other jurisdictions allow laws to remain in force, irrespective of the judiciary's finding as to whether those laws are consistent with the relevant bill of rights.

Under the *Human Rights Act 2004* (ACT), the Supreme Court can declare that Territory laws are incompatible with rights protected under the Act. Such a declaration, however, does not affect the validity, operation or enforcement of the law, or the rights or obligations of any person. Instead, the matter is referred to the Attorney-General, who must prepare a written response for presentation to the Legislative Assembly. This is in itself a bizarre and seemingly inefficient process.

Regardless of the judiciary's exact role, their involvement in interpreting and applying a Bill of Rights is highly

problematic. By necessity, the provisions used to protect human rights are broad. For example, the First Amendment of the United States Bill of Rights provides that 'Congress shall make no law ... abridging the freedom of speech', and the *Human Rights Act 2004* (ACT) states that '[e]veryone has the right to hold opinions without interference'. In the abstract, it is difficult to know exactly what such provisions protect, or how far they extend. It falls to the courts to give such lofty statements meaning, and to apply them to people, circumstances and events.

Judges are also saddled with the task of resolving conflicts between two or more rights. For example, one person's 'freedom of expression' may collide with another person's right to 'enjoy his or her culture'. The most difficult and significant questions about human rights are thus deferred to the courts.

Once a Bill of Rights has been implemented, it is judges who stand at the coal-face, not Parliament. The judiciary is unelected and unrepresentative. Therefore, their significant role in articulating human rights is undemocratic. Furthermore, the involvement of judges in this sort of task creates problems for the judicial system itself, because judges are dragged (often reluctantly) into highly politicized disputes.

THE PRICE OF CONSTITUTIONAL ENTRENCHMENT

There is a danger that once particular freedoms and values are entrenched in the Australian Constitution, they will be set in stone. Successful referenda are few and far between—since 1901 there have been 42 proposals for constitutional change, but only eight have gained the requisite 'double majority'. It is appropriate that changes to our system of government are rare. However, it is much less desirable that human rights are constitutionally en-

trenched, because Australia's understanding of rights is constantly evolving. We cannot imagine the kinds of liberties that will need protection in the coming century and beyond. For this reason, it is much more sensible to place our trust in the mechanisms that already protect human rights, but are flexible enough to reflect change over time. If Australia were to institute a Bill of Rights, it would eventually stagnate, and could inhibit the freedoms of future generations.

Furthermore, a Bill of Rights could have a chilling effect on the rights of Australians *today*. Several commentators have observed that 'to define a right is to limit it'. The process of articulating and entrenching rights is selective—rights are restricted through the language that is used and the protections that are omitted. Once implemented, a Bill of Rights could be seen as the high water-mark of rights protection—it could become a standard that is usually met, but never exceeded.

Many people are bewitched by the idea of an Australian Bill of Rights, which is promoted as a neat solution to a raft of complex problems. The reality is that there are no easy answers to difficult questions. Australians currently enjoy substantial human rights protections, which are secured by statute, common law, the Constitution, our democratic system, and, most importantly, a culture that respects liberty and equality. The implementation of a Bill of Rights is unnecessary. It would force the judiciary into a role that should be played by elected politicians. Furthermore, the process of defining human rights could limit the scope of those rights, both now and in the future. Human rights are hard work. If we are serious about protecting them, we should continue to swim against the tide.

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