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Human Rights and Civil Liberties is Volume 325 in the ‘Issues in Society’ series of educational resource books. The aim of this series is to offer current, diverse information about important issues in our world, from an Australian perspective.

KEY ISSUES IN THIS TOPIC
Protecting and promoting human rights, including civil liberties, is about making sure that basic safeguards for equality and fairness are in place so that we can prevent the violation of rights, and provide remedies when a violation does occur.

Following a recent national consultation over a charter or bill of rights aimed at dealing with some controversial issues and emerging human rights principles, the Federal Government has decided it will not be introducing a Human Rights Act in Australia, but rather a new human rights framework.

Protecting and promoting human rights requires balancing the interests of individuals and groups with the interests of society including security, public health and public order. This book examines Australia’s human rights record and a range of opinions in the debate over adequate and appropriate human rights protection.

This book presents the topic in three chapters: Human rights in Australia; Arguments for a bill of rights; and Arguments against a bill of rights.

SOURCES OF INFORMATION
Titles in the ‘Issues in Society’ series are individual resource books which provide an overview on a specific subject comprised of facts and opinions.

The information in this resource book is not from any single author, publication or organisation. The unique value of the ‘Issues in Society’ series lies in its diversity of content and perspectives.

The content comes from a wide variety of sources and includes:

➤➤ Newspaper reports and opinion pieces
➤➤ Website fact sheets
➤➤ Magazine and journal articles
➤➤ Statistics and surveys
➤➤ Government reports
➤➤ Literature from special interest groups

CRITICAL EVALUATION
As the information reproduced in this book is from a number of different sources, readers should always be aware of the origin of the text and whether or not the source is likely to be expressing a particular bias or agenda.

It is hoped that, as you read about the many aspects of the issues explored in this book, you will critically evaluate the information presented. In some cases, it is important that you decide whether you are being presented with facts or opinions. Does the writer give a biased or an unbiased report? If an opinion is being expressed, do you agree with the writer?

EXPLORING ISSUES
The ‘Exploring issues’ section at the back of this book features a range of ready-to-use worksheets relating to the articles and issues raised in this book. The activities and exercises in these worksheets are suitable for use by students at middle secondary school level and beyond.

FURTHER RESEARCH
This title offers a useful starting point for those who need convenient access to information about the issues involved. However, it is only a starting point. The ‘Web links’ section at the back of this book contains a list of useful websites which you can access for more reading on the topic.
HUMAN RIGHTS IN AUSTRALIA

The Commonwealth Government has the responsibility for ensuring Australia’s observance of internationally-recognised human rights, explains the Australian Human Rights Commission

But State governments have the responsibility to make and administer many of the laws that are relevant to human rights observance. These include laws relating to the administration of justice, land matters, health and education issues, among others. In international law, a federal system does not justify a failure to observe internationally-accepted human rights. But in practical terms, a federal system can make the task of guaranteeing that people are able to access their rights more complicated.

It is the Commonwealth Government that decides whether or not to take on obligations to observe international human rights standards. But the fact that the Commonwealth Government agrees to observe international standards does not make those standards legally enforceable within Australia. This requires specific Australian legislation. Without such legislation there is no legal way within the Australian court system to ensure that the rights in any international human rights treaty will take precedence over any state or territory legislation that is inconsistent with the treaty.

Australia has historically been an active participant in the development of international human rights standards. As new international standards have been developed, Australia has either endorsed non-binding instruments such as the Universal Declaration of Human Rights or the Declaration on the Rights of Disabled Persons, or has ratified binding legal instruments such as: the Covenants on Civil and Political, and on Economic, Social and Cultural Rights; the Conventions on Racial Discrimination, Discrimination against Women, and the Rights of the Child; and the Convention Against Torture. Australia has also ratified three of the mechanisms that give individuals the right to complain to United Nations bodies about violations of their rights.

International human rights standards have had a significant impact on Australia. A former Chief Justice of Australia’s High Court said:

“... international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.”

Brennan, 7 April 1995

The legal protection of human rights in Australia depends on a combination of the common law and statute law. Statute law is legislation of the Commonwealth parliament.

In the common law, traditional freedoms are protected by centuries of custom and the precedents set by previous court decisions. The common law is a flexible instrument that is capable of reinterpreting rights in the light of changing circumstances. However, some rights may not be well-established in the common law. Where rights are not included in legislation, they may be more difficult to enforce. Political or economic interests may be given priority over human rights. And it is always open to governments to pass new legislation either to override the common law or to vary existing legislation that provides for human rights. Australian democracy is an important safeguard against these possibilities getting out of hand, but it cannot be assumed that voters will give priority to human rights issues when deciding who should govern.
When people in Australia think about human rights, they seem often to focus on violations that take place in other countries. Human rights are seen in terms of problems such as political dictatorship, torture, arbitrary detention or extra-judicial execution.

Sometimes violations such as these happen on a large scale overseas and there is a tendency to think that, by comparison, any human rights problems in Australia are minor. However, human rights violations of one kind or another occur in all countries, including Australia. Where they occur they undermine the dignity of fellow human beings and thus diminish the recognition of universal humanity.

Ultimately, the extent to which human rights are protected in Australia depends on the values of the Australian people. The depth of these values is often tested, particularly when human rights issues arise. Community values are continually changing. The development and dissemination of international human rights standards help shape these values to protect human rights.

The Universal Declaration of Human Rights makes it clear that human rights violations involve not only so-called civil and political rights, but also economic, social and cultural rights.

The Universal Declaration of Human Rights makes it clear that human rights violations involve not only so-called civil and political rights, but also economic, social and cultural rights. Thus, if Australian society is analysed in the light of the provisions of the Universal Declaration, we can see that there are many human rights issues that need to be addressed. This is particularly so for certain groups, some of whom are especially vulnerable: indigenous people, asylum seekers, migrants from non-English speaking backgrounds, those living in poverty, people with a disability, and other groups.

Disagreement about the extent of human rights problems in Australia is in part a question of perspective. Those who have employment and educational opportunities and an adequate standard of living, those in positions of power and responsibility may not be able to see the problems from the point of view of those experiencing disadvantage or discrimination. They may not be able to fully appreciate the impact of such problems on affected individuals, families and communities.

In the following quote, the former Social Justice Commissioner, Mick Dodson, spoke of what human rights means in Australia for indigenous people. He used the term ‘social justice’, but he might just as easily have spoken of human rights generally:

“Social Justice is what faces you in the morning. It is aising in a house with an adequate water supply, cooking facilities and sanitation. It is the ability to nourish your children and send them to school where their education not only equips them for employment but reinforces their knowledge and appreciation of their cultural inheritance. It is the prospect of genuine employment and good health: a life of choices and opportunity. A life free from discrimination.”

Mick Dodson

While these standards are the entitlement of all Australians there is much evidence that these standards are not being fully met in Australia. Human rights issues can potentially affect anyone. Apart from issues affecting indigenous people and migrants, women and others may experience subtle or unintentional discrimination in the workplace and elsewhere. Children can be subjected to violence in the playground or the home. No matter what a person’s status is in society, they or a family member may at some stage in their lives have to go to court and they will want to ensure that their legal rights are observed. People’s involvement in human rights may also involve support for those subject to human rights abuse in other countries.

Failure to meet the human rights standards is not only a moral issue: our material wellbeing is impaired because this failure prevents many people from reaching their potential and making their full contribution to society.

Human rights are clearly relevant to society as a whole and to many areas of human activity, but what can people do to strengthen the observance of human rights standards?

Independent organisations such as Amnesty International have nominated areas of human rights concern in Australia, particularly the policies and actions relating to indigenous people and to Australia’s treatment of asylum seekers. Australia has also been criticised by United Nations bodies on these two issues. Many complaints are made to the Commission about discrimination, whether it is racial or sex discrimination or related to...
disability. In the areas of economic, social and cultural rights, many are affected by disadvantage, whether through restricted access to health or education facilities, housing, work opportunities or other basic needs.

Australia has a national Human Rights Commission (the Commission) and each state and territory has Equal Opportunity or Anti-Discrimination Commissions. Among its functions, the Commission has a responsibility to investigate and conciliate complaints about discrimination in areas covered by the Age Discrimination Act 2004; the Disability Discrimination Act 1992; the Racial Discrimination Act 1975 and the Sex Discrimination Act 1984.

... there can be difficulties in pursuing justice and redress for human rights violations. However, if people know what their rights are and how to access organisations that can help them, they can move forward with greater confidence.

If a complaint is made under this legislation, the Commission will investigate and attempt to conciliate the complaint with the people involved. If the complaint cannot be conciliated, the complainant has the option of going to the Federal Court or the Federal Magistrates Court for a hearing of the matter. The Court or the Magistrates service can make enforceable orders if unlawful discrimination is found.

Under the Australian Human Rights Commission Act 1986, the same conciliation processes apply, but the complainants in these matters do not have the option of going to the Federal Court or Federal Magistrates Court. Rather, if the matter cannot be conciliated, the Commission will present a report on the matter to the Attorney-General, who is required to table the report in the Parliament.

The Commission also has responsibilities to promote public awareness through education and to advise governments on the compliance of legislation with international standards and on policy and legislative development relating to human rights in Australia.

In seeking to address the problems of people whose rights are under threat, they and others who wish to promote human rights in Australia can take a variety of actions and access a number of useful institutions. These include participation in public debate and the political process, becoming involved in the work of non-governmental organisations devoted to human rights advocacy, taking issues to court and making complaints to national human rights institutions, such as the Commission, or even to the United Nations.

People often feel disempowered when trying to assert their rights, particularly if they are individuals up against a large organisation, such as the government or a big company. It can be equally challenging to face up to abuses if you know the perpetrators personally, such as within the family, or in a small business work environment. Certainly there can be difficulties in pursuing justice and redress for human rights violations. However, if people know what their rights are and how to access organisations that can help them, they can move forward with greater confidence.
### Human Rights Timeline

Use the Australian Human Rights Commission timeline below to learn more about how concepts of human rights have developed.


<table>
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<tr>
<th>Date</th>
<th>Event</th>
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<tr>
<td>Early civilisation</td>
<td>Codes associated with rulers such as Menes, Hammurabi, Draco, Solon and Manu outline standards of conduct for their societies, which existed within limited territorial jurisdictions. The Code of Hammurabi, written on clay tablet, outlines punishment based on 'an eye for an eye'.</td>
</tr>
<tr>
<td>1200-300 BCE</td>
<td>The scriptures of the ancient Israelites also form the basis of Christian and Muslim thinking. The Ten Commandments outline respect for life and for the property of others. The principle that a person is innocent until proven guilty and the tradition of granting asylum originate in Jewish law.</td>
</tr>
<tr>
<td>Greek city-states</td>
<td>Political rights – and duties – are conferred upon free male citizens.</td>
</tr>
<tr>
<td>500 BCE</td>
<td>Confucian teaching develops based on 'jen' or benevolence and respect for other people.</td>
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<tr>
<td>27 BCE-476 CE</td>
<td>Roman Empire develops natural law and the rights of citizens.</td>
</tr>
<tr>
<td>40-100 CE</td>
<td>The Christian New Testament teaches equality before God: 'In Christ there is neither Jew nor Greek, slave nor free, male nor female'. Followers were urged to feed the hungry, clothe the naked and forgive their enemies.</td>
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<tr>
<td>476-1453</td>
<td>Medieval Christian theology holds that infidels and barbarians are not entitled to humanistic considerations.</td>
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<tr>
<td>1215</td>
<td>Britain’s King John is forced by his lords to sign the Magna Carta acknowledging that free men are entitled to judgement by their peers and that even a sovereign is not above the law.</td>
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<tr>
<td>1492-1537</td>
<td>Colonisation of Western Hemisphere culminates in massacre of the Incas by the Spanish Conquistadors causing some Christian theologians to challenge the means employed to enforce God’s laws.</td>
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<tr>
<td>1583-1645</td>
<td>Hugo Grotius, Dutch jurist credited with the birth of international law, speaks of brotherhood of humankind and the need to treat all people fairly.</td>
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<td>1628</td>
<td>British Petition of Rights is adopted.</td>
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<tr>
<td>1648</td>
<td>Treaty of Westphalia ends Thirty Years’ War, which splits Germany into hostile religious camps. Europe reorganises into a society of nation states.</td>
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<tr>
<td>1689</td>
<td>British Bill of Rights is adopted which ensures that royalty cannot override laws created by a freely-elected Parliament; John Locke sets forth the notion of natural rights of life, liberty and property.</td>
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<td>1776</td>
<td>United States Declaration of Independence proclaims that ‘all men are created equal’ and endowed with certain inalienable rights. Thomas Jefferson was strongly influenced by Locke and French philosophers such as Montesquieu, Voltaire and Rousseau.</td>
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<tr>
<td>1789</td>
<td>French Declaration of the Rights of Man and the Citizen is adopted.</td>
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<td>1791</td>
<td>United States Bill of Rights incorporates notions of freedom of speech, press, and fair trial into the new United States Constitution.</td>
</tr>
<tr>
<td>1815</td>
<td>The Congress of Vienna is held by states that defeated Napoleon. International concern for human rights is demonstrated for first time in modern history. Freedom of religion is proclaimed, civil and political rights discussed, slave trade condemned.</td>
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<tr>
<td>1833</td>
<td>Great Britain passes Abolition Act, ending slavery in the British Empire.</td>
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<tr>
<td>1841</td>
<td>Russia, France, Prussia, Austria and Great Britain sign the Treaty of London abolishing slavery.</td>
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<tr>
<td>1848</td>
<td>Some 200 women and men meet in Seneca Falls, New York, to draft a ‘Bill of Rights’ outlining the social, civil and religious rights of women.</td>
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<td>1863</td>
<td>On January 1, United States President Abraham Lincoln issues the Emancipation Proclamation, declaring that ‘all persons held as slaves within any State, or designated part of a State, the people whereof shall be in rebellion against the United States [are] forever free.’</td>
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<td>1885</td>
<td>Berlin Conference on Africa passes anti-slavery act.</td>
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1890
Brussels Conference passes anti-slavery act.

1893
Women in New Zealand are given the vote – the first in the world.

1901
The Commonwealth of Australia is established. Because a Bill of Rights is not part of the Australian Constitution, protection of human rights is left to state and federal parliaments, not the courts. The White Australia Policy is established.

1902
Women are entitled to vote and stand for election in the first federal election.

1907
In Australia, the Harvester Judgement establishes the basic wage.

1914
The Great War begins. With new weapons, civilian populations become victims of expanded warfare. As a reaction, a new sense of international morality begins to emerge.

1919
At end of World War I, the Treaty of Versailles requires that Kaiser Franz Josef be placed on trial for a ‘supreme offense against international morality and the sanctity of treaties’. He escapes but for the first time in history nations seriously consider imposing criminal penalties on heads of state for violations of fundamental human rights. At Versailles, other treaties stress minorities’ rights, including right to life, liberty, freedom of religion, right to nationality of the state of residence, complete equality with other nationals of the same state, and exercise of civil and political rights. The International Labour Organisation (ILO) is established to advocate human rights represented in labour law, encompassing concerns such as employment discrimination, forced labour and worker safety.

1920
League of Nations Covenant requires members to ‘endeavour to secure and maintain fair and humane conditions of labour for men, women and children’, ‘secure just treatment of the native inhabitants of territories under their control’, and ‘take measures for the prevention and control of disease’.

1926

1930
Convention Concerning Forced or Compulsory Labour (ILO) is adopted.

1933-1939
A series of discriminatory laws are passed in Germany (the Laws of April and the Nuremberg Laws which progressively exclude people of Jewish ancestry from employment, education, housing, healthcare, marriages of their choice, pension entitlements, professions such as law and medicine, and public places such as theatres, cinemas and vacation resorts. Physically and mentally disabled people are murdered by gas, lethal injection and forced starvation.

1939
Germany invades Poland thus beginning the Second World War.

1939-1945
During World War II, 6 million European Jews are exterminated by Hitler’s Nazi regime. Millions of other civilians (gypsies, communists, Soviet POWs, Poles, Ukrainians, people with disabilities, unionists, ‘habitual’ criminals, socialists, Jehovah’s Witnesses, homosexuals, Freemasons, vagrants and beggars) are forced into concentration camps, subjected to ‘medical’ experiments, starved, brutalised and murdered.

1941
United States President Franklin D. Roosevelt, in a speech before the United States Congress, identifies Four Freedoms as essential for all people: freedom of speech and religion, freedom from want and fear. President Roosevelt and British Prime Minister Winston Churchill adopt the Atlantic Charter, in which they state their hope, among other things, ‘that all men in all the lands may live out their lives in freedom from want and fear’.

1942
Following the attack on the United States by Japan on 7 December 1941, the United States government forcibly moves some 120,000 Japanese-Americans from the western United States to detention camps; their detention lasts 3 years. Some 40 years later, the government acknowledges the injustice of its actions with payments to Japanese-Americans of that era who are still living. Rene Cassin of France urges that an international court be created to punish those guilty of war crimes.
1945
The United Nations (UN) is established. Its Charter states that one of its main purposes is the promotion and encouragement of ‘respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion’. Unlike the League of Nations Covenant, the Charter underscores the principle of individual human rights.

1946
The Commission on Human Rights is established by the UN Economic and Social Council (ECOSOC).

1948
On 10 December the UN General Assembly adopts the *Universal Declaration of Human Rights*, the primary international articulation of the fundamental and inalienable rights of all members of the human family and the first comprehensive statement of nations as to the specific rights and freedoms of all people. The *Convention on the Prevention and Punishment of the Crime of Genocide* (UN) is adopted.

1949
*Convention on the Right to Organise and Collective Bargaining* (ILO) is adopted.

Geneva Conventions provide standards for more humane treatment for prisoners of war, the wounded and civilians. Statute of Council of Europe asserts that human rights and fundamental freedoms are the basis of the emerging European system.

1951
*Convention on the Status of Refugees* (UN) is adopted.

1953
European Commission on Human Rights and Court of Human Rights are created; *Convention on the Political Rights of Women* (UN) is adopted.

1958
*Convention Concerning Discrimination in Employment and Occupation* (ILO) is adopted.

1961
Amnesty International established in Great Britain.

1962
In Australia, the *Commonwealth Electoral Act* was amended to grant all Aborigines the right to vote in federal elections. Enrolment was voluntary but, once enrolled, voting was compulsory. Despite this amendment it was illegal under Commonwealth legislation to encourage Aborigines to enrol to vote.

1965
*International Convention on the Elimination of All Forms of Racial Discrimination* (UN) is adopted.

1966
*International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* (UN) are adopted and opened for signature. Together these documents further developed rights outlined in the *Universal Declaration of Human Rights*.

1967
Over 90 per cent of Australians vote for constitutional changes to ensure full participation and equal treatment for Indigenous Australians. The referendum gives the Commonwealth Parliament the power to make special laws for Aboriginal Australians.

1973
*International Convention on Suppression and Punishment of the Crime of Apartheid* (UN) is adopted.

1975
In Australia, the *Racial Discrimination Act 1975* comes into force.

1976
*International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* enter into force after ratification by the required number of UN member States.

1979
*The Convention on the Elimination of All Forms of Discrimination Against Women* (UN) is adopted.

1981
In Australia, the *Human Rights Commission Act 1981* is enacted, which establishes the national Human Rights Commission. *Declaration on the Elimination of All Forms of Intolerance Based on Religion or Belief* was adopted after nearly 20 years of drafting (UN).
1984  
Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (UN) is adopted. In Australia, the Sex Discrimination Act comes into force.

1986  
Declaration on the Right to Development (UN) is adopted. In Australia, the Human Rights and Equal Opportunity Commission Act is enacted. The Human Rights and Equal Opportunity Commission is established and replaces the existing Human Rights Commission.

1989  
Convention on the Rights of the Child (UN) and the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, are adopted.

1990  
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (UN) is adopted.

1992  
In Australia, the Disability Discrimination Act comes into force.

1993  
Criminal Tribunal on the Former Yugoslavia is established to prosecute persons responsible for crimes against humanity and war crimes since 1991. These trials represent the first international war crimes tribunal since the Nuremberg Trials following WWII. Vienna Declaration and Program of Action adopted by 185 nations at the Second World Conference on Human Rights. It is the most comprehensive consensus affirmation of the universality of human rights. The United Nations General Assembly creates the post of High Commissioner for Human Rights.

1993 cont...  
In Australia, the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner is created to monitor the human rights of Indigenous Australians.

1994-2005  
UN Decade for Human Rights Education is declared.

1994  
Emergency session of the Commission on Human Rights convenes to respond to genocide in Rwanda.

1995  
Beijing Declaration at the World Conference on Women declares ‘women’s rights are human rights’. The Platform for Action adopted at the conference contains dozens of references to human rights pertaining to women.

1998  
50th Anniversary of the Universal Declaration of Human Rights.

2002  
The International Criminal Court is established to try individuals responsible for genocide, crimes against humanity and other serious breaches of human rights. In Australia, the Age Discrimination Act comes into force.

2005  
60th anniversary of the United Nations.

Sources:  
© Franklin and Eleanor Roosevelt Institute  
www.udhr.org/history/timeline.htm  
© University of Minnesota Human Rights Library  
www.umn.edu/humanrts/peace/

© Australian Human Rights Commission  
Information for Students | www.humanrights.gov.au

WHAT ARE HUMAN RIGHTS?

According to Amnesty International Australia, human rights are the basic freedoms and protections that people are entitled to simply because they are human beings.

Human rights are UNIVERSAL  
They belong to everyone, regardless of their race, sexuality, citizenship, gender, nationality, ethnicity, or abilities.

Human rights are INHERENT  
We are all born with human rights. They belong to people simply because they are human beings.

Human rights are INALIENABLE  
They cannot be taken away – period. No person, corporation, organisation, or even government can deprive another person of his or her rights.

Human rights can be VIOLATED  
Although they are inalienable, they are not invulnerable. Violations can stop people from enjoying their rights, but they do not stop the rights from existing.

Human rights are ESSENTIAL  
They are essential for freedom, justice, and peace.
PREAMBLE

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedoms,

Whereas member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now therefore: The General Assembly Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of member States themselves and among the peoples of territories under their jurisdiction.

ARTICLE 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

ARTICLE 2

1. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

ARTICLE 3

Everyone has the right to life, liberty and security of person.

ARTICLE 4

1. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

ARTICLE 5

Everyone has the right to recognition everywhere as a person before the law.

ARTICLE 6

Everyone has the right to recognition everywhere as a person before the law.

ARTICLE 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

ARTICLE 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

ARTICLE 9

No one shall be subjected to arbitrary arrest, detention or exile.

ARTICLE 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

ARTICLE 11

1. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

**ARTICLE 12**

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

**ARTICLE 13**

1. Everyone has the right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his own, and to return to his country.

**ARTICLE 14**

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

**ARTICLE 15**

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

**ARTICLE 16**

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

**ARTICLE 17**

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

**ARTICLE 18**

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

**ARTICLE 19**

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

**ARTICLE 20**

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

**ARTICLE 21**

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

**ARTICLE 22**

Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

**ARTICLE 23**

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented,
4. Everyone has the right to form and to join trade unions for the protection of his interests.

ARTICLE 24
Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

ARTICLE 25
1. Everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

ARTICLE 26
1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

ARTICLE 27
1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

ARTICLE 28
Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.

ARTICLE 29
1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

ARTICLE 30
Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.
Australia’s democratic rights and freedoms

A fact sheet from the Department of Foreign Affairs and Trade

Australia’s approach to human rights and freedoms reflects its liberal democratic ideals and a belief in the inherent dignity and the equal and inalienable rights of all people, as set out in the Universal Declaration of Human Rights. Australia played a leading role in the development of international human rights standards, and is party to six major UN human rights treaties. Australia also engages actively in UN human rights mechanisms and supports developing countries in improving human rights standards, particularly through providing significant support for the promotion of democratic institutions.

Promoting a strong, free democracy

Australia’s federal structure, independent judiciary, robust representative parliamentary institutions and independent national human rights institution (the Human Rights and Equal Opportunity Commission) play an integral role in protecting human rights. They also provide a bulwark against abuses of power and denials of fundamental freedoms.

The Australian Government encourages people to learn about and participate in Australia’s democratic institutions. Key democratic principles and practices include responsible government; the separation of legislative, executive and judicial powers; the observance of constitutional safeguards; the rule of law; a transparent criminal justice system; equitably resourced and respected opposition parties; and a free media. Australia’s strong democratic institutions are complemented by a number of specific legal protections for human rights.

Commitment to fair treatment

Human rights are inherent, inalienable, indivisible and universal. They are the birthright of all people and cannot be lost or taken away. They are all of equal importance and apply to all people whatever their race, gender, disability, language, religion, political or other opinion, national or social origin, age, property or other status. Observance of human rights, in Australia and abroad, benefits the security and prosperity of all nations and individuals. Successive Australian governments have supported these principles and systems.

Responsible government

The central features of Australia’s constitutional system are the doctrines of responsible government and separation of powers. Under responsible government, the executive is accountable to the parliament and the parliament to the people. The doctrine of separation of powers ensures the separation and independence of the executive and legislative branches of government from the judiciary. The independence of the courts, and their separation from the legislative and executive arms of government, is of great importance in Australia. Judges, in interpreting and applying the law, act independently of the government.

Laws are developed by the executive and must be approved by both houses of parliament. Once a law is passed, the separation of powers doctrine means parliament and the executive are bound to accept a decision of the courts about what a particular law means and how it is to be applied.

Legal review

In Australia, anyone, including the government, can have the lawfulness of their actions scrutinised in a court of law and be held accountable for any activity determined to be inconsistent with the law.

Government policies are implemented by a professional and apolitical public service. Citizens have the right to be given reasons for administrative decisions made about them by government officials, and to have those decisions independently reviewed through the administrative tribunal system and/or the courts.

There are also ombudsmen and commissions that can inquire into government decisions and allegations of misconduct. In addition, a network of parliamentary committees have mandates to review various spheres of government activity and legislation.

Constitutional protection

As the highest law in Australia, the Constitution specifically protects certain rights and freedoms, including trial by jury in specified circumstances, the free exercise of any religion, and just terms for acquisition of property. The Constitution also gives jurisdiction to the High Court of Australia to hear challenges to the lawfulness of government decisions.

Australia’s rights and freedoms: legislative framework

Commonwealth

- Commonwealth of Australia Constitution Act 1900 (UK)
- Freedom of Information Act 1982
- Racial Discrimination Act 1975
- Sex Discrimination Act 1984
- Disability Discrimination Act 1992
- Age Discrimination Act 2004
- Human Rights (Sexual Conduct) Act 1994
- Privacy Act 1988
- Workplace Relations Act 1996

States and territories

- New South Wales: Anti-Discrimination Act 1977 and Disability Services Act 1993 No. 3
- Northern Territory: Northern Territory Anti-Discrimination Act 1994
- Tasmania: Tasmanian
A transparent criminal justice system

It is fundamental to the administration of justice in Australia that a person accused of a criminal offence is presumed innocent until proven guilty beyond all reasonable doubt.

A person can only be detained by police for a limited period before being either released or charged with an offence and presented to an independent judicial officer (judge or magistrate) who decides whether the person may be detained in custody pending trial. In some cases, an initial assessment may be made by police, with provision for judicial review. The question of whether to initiate criminal proceedings on serious charges is determined by an independent office, for example, the Commonwealth Director of Public Prosecutions in the case of federal offences.

An accused person has the right to a fair trial, including the right to be informed of the charges laid against them. A trial must take place before a judicial officer who is independent of the executive government and legislature. Generally, a person who is placed on trial for a serious offence that is punishable by a significant term of imprisonment has the right to be tried before a jury drawn from the community. With some exceptions, an individual also cannot be compelled to provide self-incriminating testimony in court.

Legal aid services provide assistance and representation to accused people, subject to a financial means test and other conditions. A further fundamental principle of the Australian common law system is the availability of legal professional privilege. A right of appeal is available against conviction and sentence on specified grounds, including that there has been a miscarriage of justice.

Independent human rights institutions

Human Rights and Equal Opportunity Commission (the Commission)

The Commission is Australia’s most important independent national human rights institution. It handles discrimination and human rights complaints from individuals. The Commission educates the public on human rights and has the power to investigate and resolve individual complaints.

As an independent statutory body, the Commission controls the expenditure of its own budget. It can investigate complaints against the federal government and its agencies where there is an alleged breach of federal human rights legislation or international human rights obligations.

The Commission also investigates and resolves complaints of unlawful discrimination. Where a complaint cannot be resolved, the Commission may terminate the complaint and the complainant may institute proceedings alleging unlawful discrimination in the Federal Court or the Federal Magistrates Court.

Other institutions

Other institutions that promote and protect human rights in Australia include anti-discrimination or equal opportunity commissions in each state and territory and the Office of the Federal Privacy Commissioner, which investigates complaints about interference with an individual’s privacy under the Privacy Act and related legislation. Some states and territories also have privacy commissioners. The federal, state and territory ombudsmen investigate complaints about the actions and decisions of government departments and authorities in their jurisdiction.

There are many non-government organisations (NGOs) in Australia that help promote and protect human rights standards in public life. The Australian Government pursues positive and constructive relationships with human rights NGOs, and consults with them on a regular basis.

Discrimination on grounds of race, gender, disability or age

Race

Federal, state and territory anti-discrimination laws provide legal recourse to the victims of racial hatred. The relevant federal legislation is the Racial Discrimination Act 1975. Under this legislation, it is unlawful to discriminate against any person by reason of that person’s race, colour, descent, or national or ethnic origin. Such discrimination is prohibited in a number of areas including access to places and facilities, the provision of goods and services, employment and advertising.

The Racial Discrimination Act also
prohibits racial vilification on the basis of race, colour, or national or ethnic origin. ‘Racial vilification’ covers acts that offend, insult, humiliate or intimidate a person or group of people. The prohibition is subject to a number of exemptions that are intended to permit free debate on matters of legitimate public interest. This helps ensure an appropriate balance between freedom of expression and protection from racially offensive behaviour.

**Gender**

Australia’s Sex Discrimination Act 1984 aims to eliminate discrimination and sexual harassment on the basis of gender and aims to promote greater equality in all aspects of the Australian community.

**Disability**

The Disability Discrimination Act 1992 makes disability discrimination unlawful and promotes equal opportunity for people with disabilities in many aspects of public life such as employment, education and access to premises. The Act also protects relatives, friends and others from discrimination because of their connection to someone with a disability.

**Age**

Australia’s Age Discrimination Act 2004 protects individuals from discrimination on the basis of age in many parts of public life including employment, education, accommodation and the provision of goods and services.

**Freedom of expression, association, assembly, communication and religion**

The rights to freedom of expression, association and assembly are enshrined in the International Covenant on Civil and Political Rights, to which Australia is a party. These rights are subject to limitations that are reasonable and necessary in a free and democratic society to achieve an appropriate balance between freedom of expression and protection of groups and individuals from offensive behaviour.

The Australian Constitution contains an implied guarantee of freedom of communication in relation to political matters, which the High Court has determined is essential to the proper functioning of Australia’s system of democratic and representative government. The Freedom of Information Act 1982 gives every person the right to access information in the possession of the federal government and its authorities, with exemptions such as Cabinet papers.

Australia’s Constitution prohibits the Australian Parliament from making any law for establishing any religion, imposing any religious observance, or prohibiting the free exercise of any religion. From the earliest days of European settlement, religious diversity has been a fact, and religious freedom has been a part, of Australian life. While Australia is predominantly a Christian country, there are large communities that practise Islam, Buddhism, Judaism and Hinduism.

Australia also has a rich history of indigenous traditions and beliefs, as well as a diversity of other faiths. Australia is a liberal, multicultural society, and the Australian Government practises constant vigilance, through the rigorous investigation of complaints by statutory bodies, to ensure the human right to free religious expression is protected for all community members.

**Pursuing Australia’s human rights objectives internationally**

Australia is fully committed to promoting international human rights standards. The Australian Government considers human rights to be a subject of legitimate international concern and rejects attempts to portray this concern as interference in the internal affairs of other nations.

Australia’s formal bilateral Human Rights Dialogues with countries such as China, Vietnam and Laos enable it to raise human rights issues with their senior government officials. Associated technical cooperation initiatives, which are also pursued in other countries (especially Indonesia and numerous countries in the South Pacific), allow Australia to provide practical human rights training to judges, lawyers and prison and government officials. Australia supports developing country NGOs, as well as national and regional human rights institutions, such as the Asia-Pacific Forum of National Human Rights Institutions, that promote and protect human rights in developing countries.

Australia actively engages in human rights issues within the United Nations system, including at the Human Rights Council and the UN General Assembly Third Committee. As a party to six of the major multilateral human rights instruments, Australia regularly reports to the United Nations on its compliance with international human rights obligations (see fact sheet Australia and the United Nations).

**KEY FACTS**

- Australia played a leading role in the development of the international human rights system and is a party to six major UN human rights treaties. Australia is currently proceeding with ratification of the UN Convention on the Rights of Persons with Disabilities.
- Australia’s international human rights obligations are implemented in state, territory and federal legislation.
- Australia’s Constitution protects certain democratic rights and freedoms.
- Australia has formal and informal mechanisms to address alleged human rights breaches. For example, the Human Rights and Equal Opportunity Commission administers a statutory system for dealing with discrimination and human rights complaints from individuals.
LIVING IN AUSTRALIA: FIVE FUNDAMENTAL FREEDOMS

All Australians are entitled to freedom of speech, association, assembly, religion, and movement, according to this fact sheet from the Department of Immigration and Citizenship

FREEDOM OF SPEECH

Australians are free, within the bounds of the law, to say or write what we think privately or publicly, about the government, or about any topic. We do not censor the media and may criticise the government without fear of arrest. Free speech comes from facts, not rumours, and the intention must be constructive, not to do harm. There are laws to protect a person’s good name and integrity against false information. There are laws against saying or writing things to incite hatred against others because of their culture, ethnicity or background. Freedom of speech is not an excuse to harm others.

FREEDOM OF ASSOCIATION

We are free to join any organisation or group if it is legal. We can choose to belong to a trade union or to a political party. Having and debating points of view allows for a healthy and strong democracy.

FREEDOM OF ASSEMBLY

We are free to meet with other people in public or private places. We can meet in small or large groups for legal social or political purposes. Being able to protest and to demonstrate is an accepted form of free expression. Protestors must not be violent or break laws such as assaulting others or trespassing on private or public property. People can change governments in a peaceful way by elections and not by violence.

FREEDOM OF RELIGION

Australia does not have an official or state religion. The law does not enforce any religious doctrine, however, religious practices must conform to the law. We are free to follow any religion we choose. We are also free not to have a religion.

FREEDOM OF MOVEMENT

We can move freely to and from all states and territories. We can leave and return to Australia at any time. Some migrants may have conditions placed on their visa until they become Australian citizens.
The verdict is in – our rights report card is mixed: sound in many ways, but disappointingly lagging in others, writes Norman Abjorensen

A century ago the bright new Commonwealth of Australia was regarded as a social laboratory of democracy, leading the way for universal suffrage, a fair, equal and just society and civil rights. But how democratic is Australia now?

This is what we at the Democratic Audit of Australia set out to investigate, analysing data over a period of years from all Australian jurisdictions and testing what we found against four internationally accepted principles adopted by the Stockholm-based IDEA, the International Institute for Democracy and Electoral Assistance: political quality, popular control of government, civil liberties and human rights, and the quality and extent of public debate and discussion.

The report card is mixed: sound in many respects but disappointingly lagging in others. In a word: Australia could do better. What comes through the whole project is the extent to which we take our democratic values for granted but all too often fail to realise their fragility and the gradual erosion of their substance.

For example, on any scale at all, Australia is one of the wealthiest of nations, and also one in which its citizens enjoy a high degree of contentment. The 2007 Human Development Index compiled by the United Nations ranks countries on the basis of key indicators such as life expectancy, literacy, education and per capita GDP. Australia scores well across the board, coming in third behind Iceland and Norway and just ahead of Canada in fourth place. Other comparable countries are well down the list – the United States (twelfth), the United Kingdom (sixteenth) and New Zealand (nineteenth).

But behind the statistics are troubling clouds. The ultra-rosy picture of employment masks a grimmer reality, as the definition of employed is anyone who has worked at least one hour of paid employment in the preceding week, quite overlooking the rapid growth in casual and part-time employment and its attendant insecurity. The appalling life expectancy of Indigenous Australians – 17 years less than for non-indigenous – and the growing extent of homelessness are but two of the other serious blemishes that call into question just how inclusive we are as a society.

Inclusiveness is difficult to measure, but it nevertheless remains an important indicator of our collective democratic health, notably in regard to the state of political equality and its implications for social cohesion. There is clearly a broad commitment to the idea of equal citizenship, but the practice does not always reflect this. For example, gender can (and does) affect the practical day-to-day experience of citizenship, just as ethnicity and race do. It is only a few decades since the time when Indigenous Australians or women forfeited their Australian citizenship if they married a ‘foreigner’. In contrast to Britain, Australia’s citizenship legislation, enacted in 1948, did not set out the rights and obligations attached to citizenship; rather, these were left to be determined by the complexity of other legislative provisions that continue to discriminate on the basis of citizenship, the 2007 Australian Citizenship Act notwithstanding.

Despite the well-entrenched system of compulsory voting, it is a little known fact that only some 84 per cent of the eligible adult population is enrolled to vote – a situation due not only to problems with youth enrolment but also to the number of permanent residents who are not citizens and are excluded from voting. Permanent residents also experience different rights in different states when they try to vote in local government elections.

Australia scores comparatively well in regard to the rule of law and access to justice, but again a closer examination reveals flaws and shortcomings. In general, the rule of law is respected and operates widely across the country. A process has often failed those fleeing persecution and seeking asylum in Australia.

Australia has frequently been found in breach of its obligations under the International Covenant on Human Rights and Civil Liberties.
In terms of corruption, Australia fares better than most countries, but the AWB affair hurt its reputation badly, causing a slip from near the top of the table to equal ninth in the Corruption Perceptions Index compiled annually by Transparency International. While the Commonwealth performs reasonably well, the record at state level is far from unblemished, with two former premiers of Western Australia, and former ministers in Queensland and Western Australia imprisoned for corruption over the past two decades.

In terms of public deliberation, Australia scores some major positives with the existence of two independent, publicly funded national broadcasters, a news media that is generally free, greater uniformity in formerly inhibiting defamation laws and a welcome self-scrutiny by the media industry in such forums as the ABC’s Media Watch. On the debit side, though, there is the abnormally high concentration of media ownership, the political and financial pressures on public broadcasters, tighter restrictions on news reporting through draconian anti-terror laws, lack of protection for journalists who protect their sources and generally inadequate and ineffectual freedom of information laws.

While we have free and fair elections that are the envy of much of the developing world, the extent of genuine popular control of government is questionable. For example, the lack of public support for privatisation of public enterprises has not deterred governments of all persuasions from selling off public assets. Similarly, there are real questions about accountability of governments to parliament and to the people, with the clerk of the Senate, Harry Evans, noting just last week that Australian parliaments were among the weakest in the democratic world in this regard.

Overall, it’s not an entirely bleak picture, but we are nowhere near as good as we like to think we are.

Norman Abjorensen is a member of the Democratic Audit of Australia and co-author of the Audit’s new book, ‘Australia: The State of Democracy’.  

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MUCH TO DO ABOUT RIGHTS

Australia has a near-exemplary record of signing on to human rights treaties. It’s a shame the follow-through has let us down, argues Robyn Seth-Purdie

When a country signs on to one of these binding agreements under international law, it undertakes to act in accordance with all articles. That is, to give effect to all the treaty rights and freedoms in a way that does not discriminate between men and women or between groups of people of a particular colour, creed or nationality, and to accept and co-operate with the associated monitoring and accountability mechanisms.

In the first half of this year Australia was called before the UN Committees that monitor states parties’ compliance with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) respectively. These Committees found that Australia has much work to do about the rights it has committed to protect.

The Human Rights Committee published its findings in March. It was critical of Australia for not having acted on its number one obligation – that of ensuring that all rights recognised in the ICCPR are reflected in law, policy and practice. Such rights include freedom of expression and of association, fair trial, freedom from arbitrary imprisonment, and freedom from torture and other cruel, inhuman or degrading treatment or punishment.

During hearings, Committee members left the delegation of Australian officials in no doubt as to their concerns about Australia’s record in recent years of consistently rejecting recommendations on individual complaints made to it under the First Optional Protocol. One Committee member reminded the delegation of a fundamental principle of international law – that treaties are for keeping; they should not be broken through acts of commission or neglect. When human rights treaties are violated, the breach injures not only those individuals in Australia whose rights are violated. It also damages Australia’s reputation both as a country where people can find true freedom and dignity, and as a state whose word is its bond when it signs a ‘contract’ with fellow members of the international community.

When the Concluding Observations of the Committee on Economic Social and Cultural Rights – the body charged with monitoring progress in protecting rights such as living and working standards, as well as housing, health and education – were published in May, they contained themes in common with those of the Human Rights Committee.

The most basic of these themes is a failure to provide a framework for giving effect to Covenant rights in domestic law. Without such a framework, the enjoyment of these rights is not guaranteed, as neither the Commonwealth nor the States and Territories have assumed responsibility for recognising and protecting them. Violations of the rights of indigenous Australians – in the suspension of protections against racial discrimination, and the continued absence of a national representative body – drew criticism from the Committee. So, too, did the continued use of Christmas Island, changing territorial borders for migration purposes and mandatory detention of asylum seekers. The continuing wage gap between men and women, unduly restrictive industrial relations legislation, and inadequate social security benefits and coverage were also criticised. The Committee also criticised the weak mandate and inadequate resourcing for the Australian Human Rights Commission.

If the government fails to integrate treaty rights into Australian law, policy and practice, it has failed us and we need to demand action.

Defending economic, social and cultural rights is as important as advocating for civil and political rights. Economic, social and cultural rights are real rights because they express the essential interests of individuals if they are to flourish and make the fullest possible contribution to the life of their community. This is why, for example, the death as a direct result of poverty of 25,000 children a day globally, is a human rights issue. Together these rights provide the conditions essential for a life of dignity and social inclusion. Without them civil and political rights are hollow. And vice versa. This reflects what is known in international human rights law as the interdependence of rights. The violations of treaty rights identified by these two UN Committees indicate very clearly the need to address the substantial shortcomings in Australia’s current arrangements for protecting rights.

When our government ratifies a treaty it does it on our behalf. It is our treaty. We are the intended beneficiaries. Treaty rights are our rights. And treaty responsibilities are our responsibilities – they arise from the need to respect the corresponding rights of others. If the government fails to integrate treaty rights into Australian law, policy and practice, it has failed us and we need to demand action.

Australia needs, at the very least, a Human Rights Act that includes civil, cultural, economic, political and social rights, an Act that forces legislators, policy-makers and decision-makers to take treaty rights into account. Until then, Australia will still have much to do about rights.

Since joining Amnesty International Australia in 2007, Robyn Seth-Purdie has briefed UN treaty bodies in New York and Geneva on Australia’s human rights performance. She contributes lectures to the Masters in Social Policy Course at the ANU and has published papers in social policy, governance and public administration. She has a long and varied background in the public sector, including policy analysis and review, program management, complaint investigation (with the Commonwealth Ombudsman) and research on inquiries. She has a PhD in Psychology and a Diploma in Jurisprudence from the University of Sydney and is a member of the Australian Institute of Management Consultants.

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Australia commits to addressing UN human rights concerns

Australia commits to give full and proper consideration to 145 international recommendations to better protect human rights, according to this announcement from the Australian NGO Coalition

June, when it will provide its full response, Australia has the opportunity to close the gap between rhetoric and concrete action by accepting – and indeed taking steps to implement – these recommendations.”

Despite many countries during the review congratulating Australia on recent Government commitments to strengthen human rights, many also made strong recommendations on how Australia must do better to protect human rights, including urging that Australia enact a Human Rights Act, recognise same-sex marriage, abolish mandatory immigration detention and entrench the rights of Aboriginal and Torres Strait Islander peoples in the Constitution.

At today’s session, Ambassador Woolcott, addressed the UN Human Rights Council but did not indicate the Government’s position on any of the specific recommendations that were made. He did, however, acknowledge that Australia has much work to do in many areas, citing the significant social and economic disadvantage faced by Aboriginal and Torres Strait Islander people, the prevalence of violence against women and children, and the continued practice of non-therapeutic sterilisation of children with disability as ongoing human rights issues that Australia must address.

Many countries made strong recommendations on how Australia must do better to protect human rights ... urging that Australia enact a Human Rights Act, recognise same-sex marriage, abolish mandatory immigration detention and entrench the rights of Aboriginal and Torres Strait Islander peoples in the Constitution.

“"In the coming months, Australia’s true commitment to human rights will be put to the test both at home and abroad,” said Phil Lynch of the Human Rights Law Resource Centre. “Australia should be held to a high human rights standard. We tout ourselves as a ‘principled advocate of human rights for all’ and are a highly developed and democratised country. Despite this, we are as well known internationally for Aboriginal disadvantage and our treatment of asylum seekers as we are for barbecues and beaches. It is time for change.”

Les Malezer, of the Foundation for Aboriginal and Islander Research Action, said that this is particularly the case for Aboriginal and Torres Strait Islander peoples. “We’ve seen a number of positive steps taken by the Australian Government, such as the apology to the Stolen
Generations and endorsement of the UN Declaration on the Rights of Indigenous Peoples. However, now is the time for action. How will the Government respond to these recommendations? What concrete steps will the Government take beyond the mere rhetoric?, asked Mr Malezer.

“As an affluent, highly developed, stable democracy, Australia has no excuse for continuing to neglect some of its most disadvantaged and vulnerable populations,” said Mr Schokman. “Australia can and should do better, and adopting the recommendations made by the international community will be an important step to improving Australia’s human rights record.”

The review, known as the Universal Periodic Review, is a process which provides all 193 UN countries the opportunity to ask questions and make recommendations regarding the human rights performance of each country under review.

Many of the issues and recommendations raised during the review of Australia closely reflected many of those identified by an Australian NGO Coalition in submissions to the UN and meetings and briefings with foreign diplomats in Geneva. The Coalition, which represents over 70 leading human rights organisations, includes the Human Rights Law Resource Centre, the National Association of Community Legal Centres, Women’s Legal

AUSTRALIA COMMTES TO FOLLOW-UP ON HUMAN RIGHTS RECOMMENDATIONS

The report of Australia’s appearance before a crucial UN human rights meeting in Geneva highlights addressing racism, improving the rights of indigenous peoples and overturning mandatory detention policies as key focus areas for Australia into the future. A news release from the Australian Human Rights Commission

A ustralia now has until June to formally respond to the 145 recommendations made by the international community in the Universal Periodic Review (UPR) process. Commission President Catherine Branson QC welcomed the recommendations as well as a series of voluntary pledges made by the Australian Government in the UPR process.

“Recommendations made by the international community offer us guidance and a fresh perspective on human rights priorities in Australia,” Ms Branson said.

“The Commission is particularly pleased that the Australian Government has agreed to use the outcome of our UPR to inform the development of Australia’s National Human Rights Action Plan.”

The international interactive dialogue also identified the need for Australia to improve responses to violence against women and children and to incorporate its international human rights obligations into domestic law. Human rights education in schools and harmonising laws to protect people against discrimination on the grounds of sexual orientation or gender were raised, along with calls to amend the Marriage Act to allow same-sex partners to marry and to recognise same-sex marriages from overseas.

Ms Branson said the Australian Government had participated in the process in the spirit of dialogue and cooperation. “We look forward to this continuing in Australia in order to close the implementation gap between our international obligations and our domestic system in order to ensure future improvements to human rights for all Australians,” Ms Branson said.

An act was recommended by the national human rights consultation panel headed by law professor Father Frank Brennan. Attorney-General Robert McClelland says all new bills introduced to Parliament will have to be compatible with Australia’s international human rights obligations.

But he says the Government believes a human rights framework, rather than legislation, is more appropriate.

“The Government believes that the enhancement of human rights should be done in a way that as far as possible unites rather than divides our community, and the framework is designed to achieve that outcome,” he said.

“Nevertheless, as you’ll see, the framework does reflect the key recommendations of the human rights consultation committee and we believe [it] will make a real difference.”

Father Brennan says he is disappointed by the Government’s decision.

“In the long run the question will be whether or not politicians, when dealing with complex and controversial issues such as asylum seekers or Aboriginal rights or detention questions with security, whether or not they’ll be sufficiently faithful to those obligations when there’s not the prospect of some judicial oversight,” he said.

Father Brennan says there will be a compelling case for a human rights act if the changes announced today are not proving to be effective.

“Obviously the Government has made a major commitment in response to what we’ve said about the need for further education on human rights, and with further education there may indeed be a greater groundswell of pressure on both major political parties to look at something like a federal human rights act,” he said.

The Australian Human Rights Commission also expressed its disappointment at the Government’s decision not to adopt a human rights act. Commission president Catherine Branson says the new measures are welcome but a human rights act is still needed.

“We must be concerned about abuse against children, abuse of the elderly in their frail and vulnerable years,” she said.

“We know that Aboriginal and Torres Strait Islander people do not enjoy equal health and equal education outcomes with others.

“We know there are real problems in people with a disability participating in our community and there are others.”

‘Waste of money’

Meanwhile, Shadow Attorney-General George Brandis says the Rudd Government has wasted $2 million promoting a concept which never had community support. Senator Brandis says the Opposition has always opposed the bill of rights as a dangerous and foolish idea.

“Robert McClelland nailed his flag well and truly to the charter of rights mast and he’s been humiliated by his own cabinet,” he said.

“The Opposition is well pleased that this idea will not go ahead, but an enormous amount of time, energy and public money was wasted in pursuing it.”

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On 21 April 2010, the Attorney-General launched Australia's Human Rights Framework which outlines a range of key measures to further protect and promote human rights in Australia.

The Framework acts on the key recommendations of the National Human Rights Consultation Committee and complements a number of actions the Government is already taking to encourage greater inclusion and participation in our community.

The Framework is based on five key principles and focuses on:

- Reaffirming a commitment to our human rights obligations;
- The importance of human rights education;
- Enhancing our domestic and international engagement on human rights issues;
- Improving human rights protections including greater parliamentary scrutiny; and
- Achieving greater respect for human rights principles within the community.

Specifically, the Framework demonstrates the Government's commitment to positive and practical action in relation to human rights through a number of key commitments, including:

- Investing over $12 million in a comprehensive suite of education initiatives to promote a greater understanding of human rights across the community;
- Establishing a new Parliamentary Joint Committee on Human Rights to provide greater scrutiny of legislation for compliance with our international human rights obligations;
- Requiring that each new Bill introduced into Parliament is accompanied by a statement of compatibility with our international human rights obligations;
- Combining federal anti-discrimination laws into a single Act to remove unnecessary regulatory overlap and make the system more user-friendly; and
- Creating an annual NGO Human Rights Forum to enable comprehensive engagement with non-government organisations on human rights matters.

These changes are designed to have broad effect and will enhance the understanding of, and respect for, human rights across the Australian community.

Improved scrutiny of legislation for compatibility with international human rights obligations

On 2 June 2010 the Human Rights (Parliamentary Scrutiny) Bill 2010 was introduced into Parliament. The Bill provides for the creation of the Parliamentary Joint Committee on Human Rights and the requirement for Statements of Compatibility for new Bills and legislative instruments.

The changes will affect the way that new policies and legislation are developed. You can find answers to questions about the process on the Frequently Asked Questions page of the Attorney-General’s Department website.

Please contact the Human Rights Branch to request a hard copy of the Framework or if you have any questions about the new scrutiny arrangements that are not answered in the FAQs:

Human Rights Branch
Attorney-General’s Department
3-5 National Circuit
Barton ACT 2600
Telephone: 02 6141 3415
Email: humanrightsframework@ag.gov.au

Australia’s Human Rights Framework – Education Grants

Under Australia’s Human Rights Framework – Education Grants Program, the Australian Government will provide funding to non-government organisations to prepare and deliver human rights education programs to the Australian community.

The Government will fund a range of community organisations to develop and/or deliver programs that are appropriately targeted and address information needs of different groups. Grants will be made available for a range of programs, including one-off events, short-term activities or longer-term programs running over one to three years. Information about the grants program and applying for funding is available at from the Education Grants page of the Attorney-General’s Department website.
What is a ‘framework’ and how does it protect rights?

Many were disappointed when the federal Attorney-General announced a Human Rights Framework – and not a human rights act, writes Lisa Lee

Last week, federal Attorney-General Robert McClelland launched the Government’s Human Rights Framework. This was not the announcement that human rights advocates nationwide had been hoping for. In lieu of initiating a federal human rights act, the Government’s attempt to address the many recommendations in the National Human Rights Consultation Committee report has fallen well short of any normative conclusion.

The Committee was established by the Rudd Government in December 2008 to conduct a nationwide consultation on human rights in Australia. It subsequently received in excess of 35,000 submissions – the highest number of submissions ever received in Australia for any national consultation.

From the submissions received, a clear majority of 87 per cent supported the introduction of a federal Human Rights Act. Thirteen per cent were received in opposition. In its report, which was released in September last year, the Committee ultimately recommended the adoption of a federal human rights act.

The Government’s Human Rights Framework provides for various initiatives: the provision of $2 million to NGOs and $6.6 million to the Australian Human Rights Commission for human rights education purposes; a $3.8 million education and training package for the Commonwealth public sector; a Parliamentary Joint Committee on Human Rights to monitor compliance of legislation with Australia’s ‘core’ international human rights obligations; introduction of legislation requiring that new bills be submitted to Parliament with statements of compatibility; streamlining federal anti-discrimination laws; a Human Rights Forum to be held annually to encourage human rights discourse with NGOs; and a new National Action Plan on Human Rights to be drafted in consultation with NGOs and state and territory governments.

While the Government’s funding allocations for human rights education are welcomed, a much greater commitment from the federal government is needed in the long run. Changes need to be systemic and uniform throughout Australia.

From the submissions received, a clear majority of 87 per cent supported the introduction of a federal Human Rights Act. Thirteen per cent were received in opposition.

The Castan Centre for Human Rights Law, a research centre based at Monash University for the scholarship and advancement of human rights, issued a press release on 21 April 2010 stating that “human rights education is most effective when there is a domestic human rights act on which to base that education”.

A federal human rights act would underpin human rights education in the community. Let’s hope that the educative measures in the Human Rights Framework do assist in increasing awareness in the community so that more citizens will start to question why Australia doesn’t have its own federal Human Rights Act – ideally, before the Government’s review of the Human Rights Framework in 2014.

Human rights acts have been enacted in other countries, including New Zealand in 1990, and the United Kingdom in 1998. The Committee’s report noted that Australia is
“the only Western democracy that does not have some form of national charter or bill of rights”.

Within Australia, the ACT was the first territory to enact its own Human Rights Act in 2004. Victoria followed in 2006 with its Charter of Human Rights and Responsibilities Act. These two acts are premised on a dialogue model of human rights legislation and they require parliaments to issue statements of compatibility of all laws with human rights obligations. This dialogue model enables judges to interpret laws in a manner compatible with human rights obligations, and to declare when laws are incompatible. The National Human Rights Consultation Committee recommended the implementation of this kind of dialogue model for a federal human rights act.

A federal human rights act would underpin human rights education in the community.
Let’s hope that the educative measures in the framework do assist in increasing awareness in the community so that more citizens will start to question why Australia doesn’t have its own federal Human Rights Act.

Opponents argue that a federal human rights act would enable the judiciary to ‘change’ laws. This argument relies on a misconception about the type of model under discussion.

Former High Court justice and eminent human rights authority, Michael Kirby AC CMG, stated in an address to the Law Institute of Victoria in August 2008 that such a dialogue model “does not give courts a power to override or invalidate a law made by Parliament. It simply encourages courts to interpret laws made by Parliament, in so far as they can, to be consistent with the charter. If an inconsistency exists, this is brought to the attention of Parliament. It still has the final say.”

Further, the Committee recommended that any federal human rights act include a provision requiring “legislation to be interpreted in a way that is compatible with the human rights expressed in the act and consistent with Parliament’s purpose in enacting the legislation.” Courts would be restricted to interpretation in line with Parliament’s intention, a far cry from an ‘unfettered’ judicial discretion.

The ‘floodgates’ argument is often mobilised by opponents of a federal human rights act who worry that such an act will open the floodgates to litigation in courts. This has not occurred in New Zealand, the United Kingdom, the ACT or Victoria.

The ‘if it ain’t broke’ argument also gets a run – but those who use it ignore the many inadequacies and omissions in Australia’s existing human rights laws. A federal human rights act would provide protections for the marginalised and disadvantaged in our community who fall through the gaps in our current human rights laws. Furthermore, the many inconsistencies between existing human rights laws at state and territory levels would best be resolved with the uniformity of a federal human rights act.

For the NGOs, advocates and individuals that had put forth numerous submissions during the course of the consultation in favour of a federal human rights act, McClelland’s announcement of the Human Rights Framework was a bitter disappointment.

Notwithstanding the positive measures in the Framework, the disappointment stems from the obvious omission in the new scheme. It is a misnomer to label these initiatives a ‘Human Rights Framework’ in the absence of federal human rights legislation to enforce any such framework. The framework lacks credibility in a practical sense because it fails to ensure accountability for human rights violations.

Chairman of the National Human Rights Consultation Committee, Father Frank Brennan AO, invoked the great Labor politician H. V. Evatt in his Foreword to the Committee’s report. Dr Evatt was a staunch defender of human rights and civil liberties and the first and only Australian to serve as President of the United Nations General Assembly. In 1948, he presided over the adoption of the Universal Declaration of Human Rights (UDHR). Having assisted in the creation of what is arguably the most important human rights document in the 20th century, one wonders what Evatt would make of Labor’s approach to human rights in 2010.
HUMAN RIGHTS ACT DOOR STILL SWINGING

There is no turning back from the federal dialogue model of human rights protection, writes Frank Brennan

When the Rudd Government announced its Human Rights Framework in response to the National Human Rights Consultation, I described it as a welcome though incomplete addition to protection of human rights in Australia. Many human rights activists have been very despairing about the government’s response. I am more sanguine. Let me explain.

In deciding not to open the door within a defined doorway (a Human Rights Act), the Government has just left the door swinging. How so?

In accordance with our Recommendation 17, the Government is putting in place a rights framework which operates on the assumption that the human rights listed in the seven key international human rights instruments signed voluntarily by Australia (including the International Covenant on Economic, Social and Cultural Rights) will be protected and promoted.

In accordance with Recommendations 6 and 7, Parliament will legislate to ensure that each new Bill introduced to Parliament, as well as delegated legislation subject to disallowance, is accompanied by a statement of compatibility attesting the extent to which it is compatible with the seven UN human rights treaties. Also Parliament will legislate to establish a parliamentary Joint Committee on Human Rights to scrutinise legislation for compliance with the UN instruments.

So the Executive and the Legislature cannot escape the dialogue about legislation’s compliance with UN human rights standards. Neither can the courts, because Parliament has already legislated that ‘in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material’.

Parliament has provided that ‘the material that may be considered in the interpretation of a provision of an Act’ includes ‘any relevant report of a committee of the Parliament’ as well as ‘any relevant document that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted’.

When interpreting new legislation impacting on human rights in the light of these relevant documents from the Executive and from the Parliament, the courts will assuredly follow the course articulated by Chief Justice Murray Gleeson in one of the more controversial refugee cases of the Howard era.

Gleeson said: ‘[W]here legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention, in cases of ambiguity a court should favour a construction which accords with Australia’s obligations.’ He added, ‘[C]ourts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose.’

So even though there will be no Human Rights Act, the courts are now to be drawn into the dialogue with the Executive and the Parliament about the justifiable limits of all future Commonwealth legislation in the light of the international human rights obligations set down in the seven key UN instruments.

Ultimately Australia will require a Human Rights Act to set workable limits on how far ajar the door of human rights protection should be opened by the judges in dialogue with the politicians.

That’s not all. The Government’s human rights framework notes that ‘the Administrative Decisions (Judicial Review) Act 1977 enables a person aggrieved by most decisions made under federal laws to apply to a federal court for an order to review on various grounds, including that the decision maker failed to take into account a relevant consideration’.

Retired Federal Court Judge Ron
Merkel in his submission to our inquiry pointed out that the High Court has already ‘recognised the existence of a requirement to treat Australia’s international treaty obligations as relevant considerations and, absent statutory or executive indications to the contrary, administrative decision makers are expected to act conformably with Australia’s international treaty obligations’.

Ultimately Australia will require a Human Rights Act to set workable limits on how far ajar the door of human rights protection should be opened by the judges in dialogue with the politicians.

We will have a few years now of the door flapping in the breeze as public servants decide how much content to put in the statements of compatibility; as parliamentarians decide how much public transparency to accord the new committee processes; and as judges feel their way interpreting all laws consistent with the parliament’s intention that all laws be in harmony with Australia’s international obligations, including the UN human rights instruments, unless expressly stated to the contrary.

There is no turning back from the federal dialogue model of human rights protection.

ARGUMENTS FOR AND AGAINST A BILL OF RIGHTS

George Williams summarises the arguments for and against the introduction of a Bill of Rights

**Arguments FOR a Bill of Rights**

- Australian law does not protect fundamental freedoms
- A Bill of Rights would enhance our democracy by setting out and protecting the rights that attach to Australian citizenship
- A Bill of Rights would protect the rights of minorities, possibly including the rights of non-citizens
- A Bill of Rights would give legal rights to Australians who are otherwise powerless
- A Bill of Rights would bring Australia into line with every other western nation
- A Bill of Rights would enhance Australian democracy by protecting the rights of minorities
- A Bill of Rights would meet the obligations we have voluntarily assumed to incorporate into our law instruments such as the International Covenant on Civil and Political Rights
- A Bill of Rights would put rights above politics and above arbitrary governmental action
- A Bill of Rights would improve government policy making and administrative decision making
- A Bill of Rights would help to educate Australians about human rights and their system of government
- A Bill of Rights would promote tolerance and understanding in the community and could contribute to a stronger culture of respect for human rights.

**Arguments AGAINST a Bill of Rights**

- Rights are already well enough protected in Australia
- The High Court is already protecting rights through its interpretation of the constitution and the common law
- Rights listed in the law actually make little or no practical difference to the protection of rights
- The political system itself is the best protection of rights in Australia. We should trust in our politicians and our power to vote them out
- A Bill of Rights would actually restrict rights; in other words, to define a right is to limit it
- A Bill of Rights would be undemocratic because it might give unelected judges too much power over important social issues
- A Bill of Rights would politicise the judiciary and affect public confidence in the courts
- A Bill of Rights would be expensive given the amount of litigation it could generate
- A Bill of Rights would be alien to our tradition of parliamentary sovereignty
- A Bill of Rights would protect some rights that may not be as important to future generations.

Page 35 extract from *The Case for an Australian Bill of Rights: Freedom in the War on Terror* by Prof. George Williams (UNSW Press, 2004)
Australia is now the only common law country in the world without a bill of rights. The UK and New Zealand now both have statutory Bills of Rights. Canada, Fiji, India, South Africa and the United States have constitutional Bills of Rights.

As the Chief Justice of the ACT recently noted at the National Press Club, the notion that we do not need a bill of rights because our rights are adequately protected by the common law and the Commonwealth Constitution, is simply not true and plays upon the ignorance of the law among the Australian people. Almost every freedom that Australians assume they have is not actually protected in the Constitution. For example, neither the common law nor the Constitution guarantee freedom of speech, freedom of religion or freedom from discrimination, among many other fundamental human rights.

In the words of Chief Justice Higgins:
“Fundamental rights like a right to the equal protection of the law, or the right to peaceful assembly or freedom of conscience – rights that we all assume we have and take largely for granted – simply do not exist at law.”

Justice Kirby of the High Court of Australia has said:
“the protection of fundamental human rights, and especially the rights of minorities, is one of the great issues of the law and of the world today.”

**TYPES OF BILLS OF RIGHTS**

There are two types of bills of rights:

**Constitutional bill of rights**: incorporated into the Constitution itself. The advantage of having such rights written into the Constitution is that they are ‘entrenched’ and cannot be amended or removed by any government without the overwhelming approval of the people voting at a referendum to amend the Constitution.

**Statutory bill of rights**: just like any other legislation government may enact. The rights contained in legislation, are not entrenched. They may be amended or repealed by any government with the consent of Parliament.

Source: Australian Bill of Rights Initiative | [www.abri.org.au](http://www.abri.org.au)
In his article ‘A Bill of Rights for Australia – But do we need it?’ Justice Kirby states:

“It is necessary also to put some of the values of our society above the party political debate. That is what a bill of rights can do. It can express the enduring values of a good society. It can do so in the constitutional document which gives the cement to the social cohesion of a true Commonwealth. Without it, our constitution is mechanical. It lacks the expression of the aspiration of the people to live in a free and just society, where freedom and justice go beyond political slogans and shibboleths.”

Despite statutory laws and international norms, not enough is being done to protect our fundamental rights. Governments are falling into the trap of believing that it is a power unto itself. There is an imperative to ensure that basic fundamental human rights are not undermined. The time has come to discuss the general proposition of a bill of rights, either by means of constitutional entrenchment, statutory enactment, or at the very least a draft aspirational statement of the rights that citizens ought to have.

**Common law does not adequately protect fundamental human rights**

Not all Australian citizens enjoy adequate protection of fundamental human rights. This inadequacy of protecting human rights of all citizens, in particular, the rights of asylum seekers and the individual and collective rights of Indigenous Australians, presents a compelling case for the introduction of a bill of rights.

The aftermath of the ‘Tampa’ affair and the subsequent legislation the federal government enacted demonstrated the inadequacy of existing protections for refugees.

This new legislation violates some fundamental rights of refugees, which includes the right not be returned to persecution and the right to family unity. In the meantime, the international legal standards available, such as the Refugee Convention has not been implemented in Australian law.

Refugee’s particular vulnerability revolves around citizenship. Entrenched constitutional guarantees of their rights would help to prevent any challenge to their entitlements and right not to be returned to a place of persecution.

Guarantees of due process and judicial review in relation to the determination of eligibility for asylum must also be ensured. However, such guarantees of judicial review have been removed from the regime.

The present policy of mandatory sentencing of child asylum seekers is inconsistent with its human rights obligations under international treaties. This concerns the protection of liberty. A bill of rights would enhance the possibility of challenging mandatory sentencing, so that Courts must be required to consider the individual merits of a person’s claim to be released from detention and to permit meaningful, periodic review of immigration detention. Child asylum seekers continue to be held in detention centres around the country.

Not only is the government failing to address the concerns about its treatment of refugees and asylum-seekers, but equally the rights of indigenous people. Anti-discrimination legislation provides some protection for Aboriginals where the violation of their human rights is related to discrimination. Nonetheless, that is clearly not enough, as the statistics on Aboriginal health, education and unemployment make clear.

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Despite statutory laws and international norms, not enough is being done to protect our fundamental rights. Governments are falling into the trap of believing that it is a power unto itself. There is an imperative to ensure that basic fundamental human rights are not undermined.

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In spite of the bureaucratic activity in response to Commonwealth inquiries, there are more Aboriginal people in custody than ever before, prisoners continue to die in custody, and many economic, social and cultural issues highlighted in those reports have not been effectively dealt with.

**Attempts at federal bills of rights**

Australians have debated the merits of bills of rights on and off since before Federation. More recently, two proposals have been put forward by the Whitlam and Hawke governments for federal bills of rights. None of these proposals have succeeded. The fact that we have no national bill of rights reflects the views of the framers of our constitution, who believed that basic freedoms were adequately protected by the common law (judge made law) and by our elected representatives.

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www.abri.org.au
HUMAN RIGHTS: PEOPLE WITH POWER DON’T WANT TO GIVE IT UP

The debate for an Australian charter of rights will not go way, insists George Williams

The battle for an Australian charter of rights is the debate that will not die. The question has been a persistent part of the national discussion since World War II. The decision of the Rudd government last week to rule out a national human rights act in favour of a human rights ‘framework’ will not change that. In fact, over time it will likely strengthen the case for reform.

The debate will not go away because Australia has several persistent, deep human rights problems. Most people in the community live comfortably and without fear of their basic liberties being breached. This is not the case for many others, and the failure to treat these people with the dignity and respect they deserve is what drives the push for reform.

The human rights report prepared late last year for the Rudd government by Father Frank Brennan was based upon story after story of Australian governments neglecting or ignoring people’s basic rights. Disturbingly, many of these breaches were based on policies about which our major parties have been in furious agreement, such as those that affect the lives of asylum seekers and Aboriginal Australians.

The debate will not go away because Australia has several persistent, deep human rights problems.

The Brennan report brought to light many human rights problems that are normally invisible to the broader community. These include long-term, systemic government failures when it comes to people with disabilities or with a serious mental illness. It also pointed to a growing set of problems in areas such as aged care.

The Rudd government’s response to the Brennan report contains some worthy reforms. It is, for example, a good idea to improve debate and transparency in Federal Parliament when it comes to making laws that affect our liberties. However, the response is threadbare when it comes to real action to protect the human rights of those in need.

The government’s new framework is constructed on the idea that politicians are the right people to check their own power. It is a model of self-regulation that rejects the need for an independent umpire.

If this new framework fails to protect human rights, no consequence follows. If a person’s human rights are breached, there will be no remedy.

This will ensure the idea of a charter of rights or human rights act will continue to recur as part of our public debate. The call for better protection of human rights will be a natural consequence of the failures that the system will continue to produce.

Australia is like every other democratic nation in debating this issue. We are unique only in failing to achieve reform.

The federal government has said its framework will be reviewed in 2014. This provides the next, realistic opportunity for change. The case for a national human rights act will then be even stronger.

In 2014, the human rights acts in the ACT and Victoria will have been operating for up to a decade, and will provide a solid body of evidence upon which to base the national debate. The results are already positive in showing how they improve the system of government and the quality of people’s lives. This is hardly surprising – it is also the long-term experience of nations such as Britain.

The Rudd government’s own human rights framework will likely be a catalyst for debate. It will make little difference to the protection of human rights at the community level. It will even more starkly demonstrate how self-regulation by politicians when it comes to human rights is the problem, and not the solution.

Public opinion on human rights protection is unlikely to change. The debate over a charter of rights provoked the largest community response to any public inquiry in Australia’s history. Australians were overwhelmingly in support of having better protection for human rights.

Australia is like every other democratic nation in debating this issue. We are unique only in failing to achieve reform.

Not only did the submissions to the Brennan committee clearly favour a national human rights act, but a random survey of public opinion showed that only 14 per cent of respondents opposed the reform. The problem is too many of those opposed to the new law are in positions of power, and want to see the system remain as it is.

This may again be the biggest stumbling block in 2014. It is one thing for the people to want change, it is another when that change is opposed by those who hold power on their behalf.

George Williams is the Anthony Mason professor of law at the University of NSW.

First published in The Sydney Morning Herald Opinion, 27 April 2010
The government has caved in to a minority opposed to reform, observes Edward Santow

The federal government trumpeted its new ‘Human Rights Framework’ this week. Don’t be fooled. This is not major reform.

The government had a historic opportunity to reach a new settlement on human rights, to adopt a legislative regime that the community had overwhelmingly endorsed, and which is already working well in places such as Britain, New Zealand and Victoria. Instead, the government caved in to a well-organised, vocal minority who were opposed to such reform.

Last year, the government commissioned an independent inquiry – the biggest in Australia’s history – to advise it on how to reform human rights law. The inquiry was led by Father Frank Brennan, and his committee criss-crossed the country seeking the views of more than 40,000 people on how to improve Australia’s protection of human rights.

The Brennan committee’s central recommendations were for a Human Rights Act, reform to laws that deal with how public servants make decisions and an integrated approach that gives each of our three arms of government – the legislature, executive and judiciary – an appropriate role in protecting rights.

Attorney-General Robert McClelland deferred consideration of those core recommendations until 2014 at the earliest. Instead, the government announced three new measures. First, it will revamp the parliamentary committee system for considering the likely impact of draft laws on human rights. Secondly, there will be a National Action Plan that will be designed to give greater priority to human rights in the public service.

Thirdly, the government will improve how Australians learn about human rights, by making this part of the new national curriculum and giving the Australian Human Rights Commission and NGOs additional funding to teach people about rights.

As an advocate of stronger human rights protection, I feel like I’ve been offered tea, but only provided with a cup of milk and sugar. The changes announced by the government are all good ideas, but they are missing the key ingredient of legislative reform. Without a Human Rights Act, these changes are unlikely to have their intended impact.

Imagine if the government announced plans to educate people about the importance of road safety, but then chose not to outlaw drink driving. If we believe that protecting human rights is important, then we need to do what every other liberal democracy has done and enact legislation that deals with human rights comprehensively, while remaining faithful to the fundamental tenets of our legal system.

To be clear: there is merit in the government’s measures to improve pre-legislative scrutiny, and work co-operatively with the public service and all Australians to improve our understanding of each others’ rights. There is strong evidence to suggest that such measures can be successful, but this is predicated on their being introduced as part of a substantive law reform package. As one participant in the Brennan inquiry commented, “A right that can’t be enforced isn’t a right. It’s just a good idea.”

So, why has the government not proceeded with a Human Rights Act? McClelland’s concern was that such a reform would be too “divisive”. But we need to look at the nature of this division.

Of the 35,000 submissions the Brennan committee, 83 per cent supported a Human Rights Act. In independent opinion polling commissioned by the committee, 57 per cent supported an Act and only 14 per cent were opposed. This suggests that, while there might be division, there is also a clear majority view in favour of a Human Rights Act.

There was, of course, very real opposition to a Human Rights Act. For example, there were concerns from some conservative Christian groups about its impact on religious freedom. But to maintain that those concerns could not be accommodated without killing off a Human Rights Act ignores the careful balance struck in Britain, New Zealand and Victoria.

Liberal Senator George Brandis even suggested that this was part of some kind of “left-wing social agenda”. If that were really the case, then it seems that Australia must be the last non-communist bastion in the world, as every other liberal democracy has a comprehensive human rights law.

In truth, if you avoid the rhetoric and focus on the hard evidence, it seems clear that the government has eschewed a proven means of improving rights protection for those most vulnerable in our community, such as people with a disability, indigenous Australians and elderly people.

Ultimately, major reform in a contentious area like human rights is not easy. Division might be undesirable but it is probably inevitable. Twenty-five years ago, sex discrimination laws were opposed by large swathes of the Australian community. Some parliamentarians argued that such laws go against “nature” and would encourage “radical feminism”.

Now the Sex Discrimination Act is a cherished part of our legal landscape, and one that is embraced by both sides of politics. But in order to bring about this change in Australian culture, the then federal Labor Government needed to show leadership. Once again, in an area of fundamental rights, a federal Labor Government has had the opportunity to show leadership. While the government has made some positive noises, on balance the opportunity has been missed.

Edward Santow is the director of the Charter of Human Rights Project at the Gilbert + Tobin Centre of Public Law, University of New South Wales.
Stance on human rights has everything – except a charter

Weak arguments should not be allowed to sink plans for a charter, writes Sarah Joseph

The federal government’s formal response to the National Human Rights Consultation Committee’s report contains welcome initiatives focused on reaffirmation, education, engagement, protection, and respect for human rights. However, a key word is missing from that list: accountability.

In that regard, it is regrettable that the government has chosen to reject the committee's cornerstone recommendation that it introduce a federal human rights charter. Australia will therefore continue to stand alone as the only Western democracy without comprehensive legal protection of human rights.

The ‘charter of rights’ debate has thrown up some familiar furphies. Such a charter is said to transfer too much power to unelected judges. This argument seems to imply that an ‘unelected’ judge is a bad thing. Yet the unelected nature of our judiciary is a strength: a judge cannot be independent and impartial if he or she is elected. In any case, under the committee’s proposed charter, Parliament was always going to retain the final say on human rights matters. It could have reversed interpretations that it did not like, and could have ignored a judicial declaration that a law was incompatible with human rights.

There have also been concerns that a charter would politicise the judiciary. While human rights matters can involve politically charged issues on occasion, it is impossible to shield the courts from political matters.

Our High Court has pronounced upon the validity of many historically contentious laws, such as WorkChoices, the Tasmanian dams legislation and, long ago, the Communist Party Dissolution Act. Our judges are capable of making principled, apolitical human rights decisions.

The outer limits of some human rights may seem quite imprecise. For example, freedom of expression can be limited under international human rights law in reasonable and proportionate circumstances.

It has been said that these standards are too vague for the judiciary to cope with. Yet vague standards arise in many areas of law: standards of negligence are measured against the hypothetical actions of ‘the reasonable man’.

Tests of reasonableness and proportionality also pepper Australian constitutional law. Moreover, judges would not interpret human rights in a vacuum: there are plenty of international cases, including from countries such as Britain and Canada, that shed instructive light on the meaning of human rights.

Another argument is that a charter would be a bonanza for lawyers and would clog up our courts. That has simply not happened in Victoria, the ACT or Britain, which all have human rights charters of the type recommended by the committee.

This argument seems to be based on the comparative experience of the US. But the US has a different legal culture – for example, unsuccessful litigants are rarely required to pay the winner’s costs.

Finally, there is the tabloid favourite – that a human rights charter would be of the greatest use to villains and criminals. Criminals and suspected criminals are most likely to make claims regarding the right to a fair trial or procedural rights concerning arrest and detention, rights that judges are already familiar with. They may also make claims about their right to humane treatment in custody.

We doubt that many of the ‘rogues’ charter’ critics are seriously arguing that criminals or suspected criminals should be subjected to arbitrary (as opposed to justified) arrest, unfair trial, or inhuman treatment.

When the human rights of suspects are not respected, miscarriages of justice often follow. Consider, for example, the forced confessions and wrongful convictions of the terrorist suspects known as the Guildford Four and Birmingham Six in Britain, and the farcical detention, charge, and deportation from Australia of Dr Mohamed Haneef in 2007.

The rights that protect criminals and suspects, in fact, protect us all. They also promote good policing practices, helping to minimise the maltreatment of suspects and the arrest or conviction of innocents.

The huge majority of the people who contributed to or were surveyed during the National Human Rights Consultation favoured a human rights charter. In fact, the level of response to the consultation was the largest in Australia’s history.

So what, one wonders, has caused the government to reject the key recommendation arising from that consultation? After all, the arguments against charters of rights are not new – the government would have been aware of them before establishing the consultation process. Attorney-General Robert McClelland merely stated that a charter would “divide the community”; there was little elaboration.

Alas, the government’s response – as well as other recent acts, such as suspending asylum applications from Afghanistan and Sri Lanka – indicates that human rights have been given a low priority during this election year. In largely retaining the ‘safe’ status quo, the government has chosen to deny Australians any right of redress when their human rights are abused.

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What do Gough Whitlam, Malcolm Fraser, Gareth Evans, Fred Chaney, Natasha Stott Despoja, Bob Brown and Steve Bracks have in common? Aside from careers in politics, little, it would seem. They come from across the political spectrum and from all corners of the country. They have served as prime ministers, ministers, premiers and party leaders. They span at least six political generations. Yet, despite these differences, they all support an Australian human rights act.

Human rights have not always been a political football. As the Rudd government finalises its response to the report of the National Human Rights Consultation – the centrepiece of which is a human rights act – it is worth remembering that conservatives have not always opposed such an act, nor have those on the left always considered one to be ‘controversial’.

History demonstrates how truly universal and bipartisan support for human rights has been. Just over 60 years ago, Labor Attorney-General and Foreign Minister Herbert ‘Doc’ Evatt presided over the UN General Assembly as it adopted the historic Universal Declaration of Human Rights. Forty-eight nations voted in favour of the declaration, none against.

Following the declaration’s adoption, Evatt rightly predicted that “millions of people all over the world would turn to it for help, guidance and inspiration”. Conservative leader Winston Churchill advocated its adoption into the British legal system, calling for a charter of human rights “guarded by freedom and sustained by law”.

Some 20 years later, the declaration was enshrined as international law in two major treaties: the covenants on civil and political rights, and on economic, social and cultural rights. Labor prime minister Whitlam signed both treaties within the first two weeks of his election. Fraser, his Liberal successor, ratified both covenants, making them binding on Australia.

The importance of the legal recognition and protection of human rights was one of the few issues on which, at the time, both men agreed. But despite this, and despite Australia being a consistent champion of human rights on the international stage for the next 40 years, no Australian leader has taken the further steps necessary to protect those rights in Australian law.

In 2010, the report of the National Human Rights Consultation demonstrates the continuing broad base of support for human rights in Australia and presents an opportunity and imperative to bring our human rights legacy home. For, while the legal protection of human rights may not en- thruse some politicians – Tony Abbott, for example – it is clearly an issue of great concern to the Australian people.

Human rights have not always been a political football.

The National Human Rights Consultation committee received a record 35,000 submissions and hosted 66 round-table meetings throughout metropolitan, regional and rural Australia. It found that “after 10 months of listening to the people of Australia, [there is] no doubt that the protection and promotion of human rights is a matter of national importance”.

Its report establishes that while most of us recognise that this is a great place to live, we also recognise that we could and should do more to protect the rights of the vulnerable and disadvantaged. Independent polling found that up to 75 per cent of Australians support stronger measures to protect the human rights of people with mental illness, the elderly, Aboriginal Australians and people with disability.

Support for a human rights act is deep and diverse: 87 per cent of submissions were in favour, and independent polling found 57 per cent support and only 14 per cent opposition. Australians understand the fundamentally democratic role of the judiciary in protecting human rights and the rule of law. We do not subscribe to the simplistic characterisation of this debate as being about whether we trust parliament on the one hand, or courts on the other. In fact, 86 per cent of us consider that government has a high level of responsibility in relation to the promotion and protection of human rights; 84 per cent also recognise the significant responsibility of the courts in this regard.

Those opposed to a human rights act have leapt on the federal Attorney-General’s recent observation that human rights should be protected “in a way that as far as possible unites a community rather than causes further division”, asserting that this ‘dooms’ the passage of an act.

These people, however, do an injustice to the bipartisan history of human rights. They also underestimate the propensity of Australians to unite behind good, evidence-based policy, particularly where it reflects and resonates with our values of dignity, respect, tolerance, freedom and fairness.

Two years ago the Rudd government was faced with similar opposition in relation to the proposed apology to the stolen generations. Opponents predicted a flood of compensation claims and highlighted that, while polls showed 55 per cent support for the government’s decision to say sorry, 36 per cent opposed it.

They said the apology would be contentious and divisive and would not advance the cause of reconciliation. Just a week after the apology, however, support had risen to 78 per cent. The apology displayed the power of bold, responsible political leadership and the ways in which a commitment to fundamental human rights and the alleviation of disadvantage can unite us. We should now unite around a human rights act.

Philip Lynch is director of the Human Rights Law Resource Centre.
Australia is said to be well behind the rest of the world in not having a national bill of rights. I think Australia can leapfrog the pack and become a world leader if it plays to its strength as a progressive parliamentary democracy and devises a bill that works as a political rather than a legal instrument. The secret is to bypass the heated but stalled debate over the relative powers of elected politicians versus unelected judges. Then we can focus on the relative powers of two sets of elected politicians: the political executive which is the minority of parliament that forms the government of the day, and the parliament as a whole which can use a bill as a political instrument to set standards for government compliance with a broad range of political rights.

Think of this as a classic third way. The first and second ways are deadlocked. At the moment, advocates of a bill of rights argue that elected politicians cannot be trusted to protect citizens’ rights. Defenders of the status quo argue that unelected judges have no legitimacy making political judgements about how to balance competing rights, a task that should fall to elected governments.

The third way recognises that neither the political executive nor the judiciary should override parliament as the legitimate forum for political decisions about how best to balance competing social and political rights. And something like parliament must do the balancing: for instance, in policies relating to national security, where governments seek authority for policies that trade-off rights to civil liberty against rights to peace and security.

The courts can potentially balance the competing rights when legally challenged, but an important role remains for parliament to hold governments accountable to political as distinct from legal standards of rights protection.

Bills or charters of rights can set either legal or political standards. The most constitutionally entrenched bills of rights tend to provide the courts with leverage to set legal standards for judging the performance of government. Citizens can have legal claims against government and take government to court for not complying with those legal standards.

But as many commentators have argued, this gives courts great powers to balance competing rights, including the political rights of governments to make hard decisions about the public interest against the legal rights of citizens (or well-heeled interest groups) to refuse to comply with a government’s alleged denial of their legal rights as protected in a bill or charter of rights.

The third way deals parliament back into the picture. Bills of rights are devices to respond to the problem of bad government. But they are not the only device at our disposal. The Commonwealth Parliament already has a variety of mechanisms that set standards for government compliance in relation to the rights of Australian citizens. Among them are political instruments that stay clear of the courts and keep the debate over government action in the parliamentary realm as a matter for political rather than legal determination. An example is the legislative scrutiny of government bills by dedicated parliamentary committees responsible for assessing government compliance with parliamentary standards of, you guessed it, rights protection.

It is happening now, in all Australian parliaments. This form of parliamentary rights protection began in the Australian Senate in the 1930s, with the establishment of the committee to scrutiny delegated legislation.
(government regulations) to ensure that government was not, without good reason, arming itself with powers at the expense of individual rights.

This historical parliamentary innovation was a world first. Over time, parliament developed a set of standing orders that works like a mini-bill of rights, designed to force governments to justify each and every policy deviation from strict compliance with a set of standards devised and authorised by the Senate.

The committee continues to this day, holding government honest by compelling governments to explain on the public record each time it seeks to trade-off one set of rights (e.g. public health) against another (e.g. privacy). The case load of this and related state committees are a showcase of how political instruments can contribute to rights protection, with executive and non-executive politicians forced to debate and justify their political judgements about the public interests being served by the balances they defend.

A toothless tiger? No way: parliament has also established standards for the procedural protection of rights that empower either house of parliament to disallow any government regulation that that, in the political as distinct from the legal judgement of parliament, is unjustified. Disallowances occur each year, not that governments are keen to publicise their own losses.

This approach to right protection was born again in the early 1980s when the Senate established the scrutiny of bills committee to subject bills to audits similar to those given to regulations. Similar processes take place in all Australian parliaments. The main point here is that the committees make informed political judgements about the appropriate balance of rights expected of governments, well before the courts have any role in hearing challenges to later government action.

We do not have to wait for community agreement on one of the many models for a court-focused bill of rights. We can start by strengthening the existing political instruments that protect the community’s rights against inappropriate government powers.

I was reminded of the importance of Australian parliamentary traditions when I co-chaired a Canberra workshop on bills of rights at Parliament House last Friday where Shadow Attorney-General George Brandis quoted former Labor Party justice minister Michael Tate in support of this general approach for greater parliamentary involvement in standards setting.

The approach is thus bipartisan, demonstrating that there is a third way forward in rights protection that preserves a role for parliament as, over the executive government or the courts, the right public forum for balancing political judgements about competing rights.

Of course, the political executive retains responsibility for making the hard decisions about what effective balance parliament should support, and the courts retain responsibility for resolving grievances over specific government trespasses on legal rights.

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Noticeably absent from Australian discourse on human rights protection is consideration of the fundamental philosophical question that needs to be resolved, which is, “Why are people entitled to the legal protection of human rights?” Answering this question would make the answers to technical constitutional questions involving the balance of power between the courts and Parliament easier to determine.

There are two answers. The first is that, after World War II, the international community rejected the argument that enactment of a law by an effective government was the sole test of a law’s validity. The war crimes trials and trials under the domestic law of Germany held that laws which transgressed human rights were not valid law has to be consistent with some value system. This led to promulgation of the Universal Declaration of Human Rights and other human rights treaties which require their signatories to respect human rights within their own jurisdictions.

None of these documents has a footnote saying, “These rights are not applicable to democracies”. Indeed, their drafters had in mind events such as German voters’ validation in a referendum in 1934 of Nazi legislation removing civil liberties. It makes no difference whether legislation inconsistent with rights has been enacted by a democratically elected legislature it is still an abuse of human rights. Australia has ratified all these documents surely it should apply domestically what it preaches internationally?

The second is that, as a matter of logic, protection of individual rights is an objective good. The easiest way to understand this is to refer to the theories of John Rawls, who hypothesised what would happen if people were asked to devise the fundamental rules of a society behind a “veil of ignorance” that is, unaware whether, in that society, they would be black or white, rich or poor, man or woman, Muslim or Jew, victim of crime or crime suspect.

Democracy depends on the protection of freedom rather than freedom depending on democracy.

Rawls said that, motivated by a paradoxical mixture of self-interest and empathy, people would logically accept as a basic principle that each person should have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others. Practical implementation of this requires the recognition of civil and political rights.

Opponents of a Bill of Rights argue that protection of our rights ultimately rests on democracy and that therefore the democratic will should not be subject to control by a Bill of Rights. Characterising democracy as the supreme value depends on a more fundamental claim that people have a ‘right’ to be governed democratically. But what is the source of that right? Obviously, it must derive from a rights theory superior to democracy itself. If one does not accept the primacy of rights, then one has no touchstone to which to refer to justify why oligarchy, aristocracy, or dictatorship should be rejected as forms of government. Democracy depends on the protection of freedom rather than freedom depending on democracy.

Those who reject a Bill of Rights argue that it would give excessive power to an unelected judiciary over the elected parliament and thus, by extension, over the individual. In reality, what a Bill of Rights would do is redress the power imbalance between the individual and the government, by giving the individual the power to challenge the government, with the courts acting as umpire.

Often stated in conjunction with this argument is that which says human rights abuses can be remedied through the political process. This is either naive or cynical. Of what use is it to a victim of legislatively authorised human rights abuses to be told, “There is an election in three years’ time your remedy is to campaign to have the law changed, and, if there is a change in 34

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government, and if this issue is a plank in the new government’s program, perhaps the law will be changed?”

The very utility of a Bill of Rights is that it provides the individual with an instant weapon vis-a-vis the government the ability to go to court to have the infringement of rights remedied, rather than making an entitlement to fundamental rights contingent on the vagaries of party politics.

The next argument is that the courts are ill-equipped to engage in the process of balancing competing social interests. Yet this has been a basic aspect of judicial decision-making throughout the history of the common law.

Such tests have been applied by Australian courts in relation to human rights at least since 1943 when, in a case interpreting the right to freedom of religion in s116 of the Constitution, Justice Hayden Starke stated that given that the rights protected by the Constitution are not absolute, courts must inevitably balance them against the countervailing legislation. Such is the case in relation to all the express and implied freedoms currently protected by the Constitution.

This leads to the final argument against a Bill of Rights, which is that it would vest the courts with extensive new powers. This is not correct Parliament was born subject to the provisions of the Constitution, and has always been subject to the power of the courts to declare unconstitutional legislation invalid, including legislation which is inconsistent with the four express rights it contains and other implied freedoms that have been read into it.

What a Bill of Rights would do is increase the scope, but certainly not the nature, of the functions discharged by the judicial branch. Given that the drafters of the Constitution saw fit to some express rights in it, why not include the full range of rights?

The current terms of reference of the National Human Rights Consultation prohibit it from recommending any model requiring constitutional amendment. Some advocate a document similar to the ACT Bill of Rights and the Victorian Charter, which empower the courts only to declare that a law is inconsistent with the Bill of Rights.

Contrary to what some have argued, such a law would not breach that aspect of the doctrine of separation of powers which says that the courts cannot give advisory opinions. That rule prohibits the courts from making declarations in the abstract where there are no litigants or where the law has not yet been enacted. Making a declaration that an enacted law challenged by a litigant is inconsistent with a Bill or Charter would be constitutional. Declaration, as a legal remedy, has long been available to the courts.

A Bill of Rights would redress the power imbalance between the individual and the government, by giving the individual the power to challenge the government, with the courts acting as umpire.

However, I hope we go further, and enact a Bill of Rights along the lines of the Canadian Charter one which the courts can use to invalidate inconsistent legislation, but which Parliament could override as long as it expressly stated it was doing so a model similar to that required by s10(1) of the Racial Discrimination Act when Parliament wants to override its provisions. This is surely not too much to ask if politicians are going to take away our rights, should they not at least be willing to tell us they are doing so?

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Three cheers that we won’t have charter of rights

The advocates of a human rights charter must be walking around as if they’ve suffered concussion or been mugged by reality, observes Bob Carr.

The federal government gave them an inquiry. The inquiry took nine months to agitate public opinion over rights. Geoffrey Robertson stumped the country and produced a book. And the federal cabinet said no. It makes me feel happy about Australia.

There will be no charter of rights because there’s no crisis of rights in Australia. If the public believed the executive arm of government were stifling freedoms, Australia slipping behind other democracies, there would have been a decided shove towards a human rights act. Something like the political shift against big government in the US. Instead, when Frank Brennan launched his report in September, it sunk below the water, not leaving a slick of printer’s ink.

Australians have a high civic IQ. They know their country is robustly free. They wake each day to see their elected leaders, state and federal, traduced in the media. They have seen victims such as Mohamed Haneef triumph against the authorities in the courts. The people have changed a federal government and have made two recent state elections look competitive.

Yet the people are probably reasonably happy that government can take action to limit liberties, as the Victorian government did in November when it gave police the power to target knife and alcohol violence. This included the right to stop and search people without suspicion (in unapologetic contradiction of Victoria’s own charter).

Governments state and federal have also strengthened laws against terrorism and, far from feeling threatened, people feel more secure.

In November I debated a charter with Michael Kirby. The former High Court Judge showed he was a politician manque with a capacity to play to the gallery that I, a mere amateur, could only envy. When he noted the teachers and students of an Islamic school in our audience, he quickly adjusted his rhetoric to assert that a charter was the only way to protect the rights of Australian Muslims.

Before the month was out French politicians were stripping Muslims of the right to wear Islamic dress in public, a proposition rejected by Canberra.

There will be no charter of rights because there’s no crisis of rights in Australia. Yet France is covered by the European Union charter that we were told had made Europeans freer than Australians.

By the way, Kirby was one of the few judges backing a charter. If there were no phalanx of judges behind the idea of more judicial review, what chance did it have?

No newspaper editorialised for a charter and the Left of Australian politics did not adopt it. The last ACTU congress heard a debate from advocates and opponents of the charter and declined to take a position. The national Young Labor conference voted down six versions of a charter. The Left of the parliamentary ALP evinced little enthusiasm.

In fact nobody was able to nominate a right that Australians lacked that would be rectified with a charter. Robertson tried when he referred to a hospitalised maritime worker who had his beard shaved off and a married couple who were separated in a nursing home. Both were cases easily sorted out by administrative appeals, not a shift in
the constitutional balance of Australia.

Paul Kelly, writing in *The Australian* (17 February 2010), made the point that Brennan’s report was based on the notion that all our problems as a society could be reduced to rights and solved by having them judicially reviewed, what I would call ‘rights fundamentalism.’ This approach falls to pieces if you think how it might be applied in many areas: in schools, for example (and Robertson had proposed that a bill of rights for Australia recognise the rights of children). Do we want schools where students are agitated to assert rights, presumably the right not to be disciplined, not to take compulsory subjects, to challenge the authority of principals?

In fact nobody was able to nominate a right that Australians lacked that would be rectified with a charter.

Perhaps a respectful learning environment is undercut by thinking of schools as arenas for these arguments.

Looking back, there was a simple-mindedness about the charter proponents. Give us a poetic list of rights, they said, and – oh joy, oh joy – extra litigation and judicial review will expand freedoms. What has triumphed – and we owe this to the Prime Minister – is a more politically literate view, a wisdom that understands that when you codify rights you freeze possibilities; that political culture counts more than pious abstractions.

I’m told that during the period cabinet was considering the Brennan report Kevin Rudd was reading Steven Pincus’s *1688: The First Modern Revolution*. That we’ve avoided a lurch towards a charter reflects Rudd’s understanding that the untidy ebb and flow of common law, free elections and freedom of speech will keep us freer than lawyers’ arguments over every word and clause in a charter. His reading would confirm it’s the ethos of a country that counts, the spirit of a people. The rejection of the Brennan report shows Rudd does not feel intimidated by a leftover item from two previous Labor governments.

Apart from Brennan and members of his inquiry, the biggest loser is the Australian Human Rights and Equal Opportunity Commission. Under its chairwoman Cathy Branson, it spent an estimated $500,000 supporting one side, the pro-charter case.

It was taxpayers’ money and should have been used to prosecute cases of discrimination.

That, after all, is the kind of bread-and-butter work that keeps us free.

Bob Carr is a former premier of New South Wales.
Why Australia should avoid a bill of rights

By international standards Australia’s human rights record is already pretty good, writes Julian Leeser

The broad-based opposition to a bill of rights, from current and former judges and parliamentarians from both sides of politics, to church groups and indigenous people, suggests that advocates are failing to demonstrate that their model provides the best method of reform.

Also ranged against them is the chequered history of bills of rights in other comparable democracies.

Bills of rights are expressed in vague language that gives rise to uncertainty in how citizens and governments ought to comply with the law. While we may agree that the principle of ‘freedom of expression’ is a good idea, under a bill of rights this idea always turns on specific cases like the regulation of tobacco advertising, the balance in defamation law or the prohibition of hate speech.

It is not possible to predict with any certainty where an Australian court might seek to strike the balance on these or other issues under a bill of rights. In fact, the vague language of such a bill runs contrary to a 30-year legislative trend to reduce judicial discretion. A bill of rights would instead revive and extend the very uncertainties that parliaments have been trying to avoid.

The experience in other bill of rights jurisdictions demonstrates that vague language produces unintended consequences. For instance, the “right to a fair trial” was used to read down rape shield laws in Britain, meaning that rape victims in the UK (unlike in Australia) can now be cross-examined on their sexual history – despite the British parliament wanting to protect rape victims from this harrowing experience. The “right to a family life” meanwhile has been used to prevent the deportation of foreign criminals and to provide prisoners the right to donate sperm to their wives and partners.

And there has been the recent and unexpected extraterritorial application of the UK Human Rights Act to the British Defence Forces in combat situations, despite neither the British army nor the British government thinking it applied.

Under a bill of rights the judiciary becomes obliged to gazump parliament by retrospectively interpreting laws not according to their plain and ordinary meaning or even their intent, as is normally the case, but to twist and strain the language of statutes to comply with human rights principles.

The experience in other bill of rights jurisdictions demonstrates that vague language produces unintended consequences. For instance, the “right to a fair trial” was used to read down rape shield laws in Britain, meaning that rape victims in the UK (unlike in Australia) can now be cross-examined on their sexual history – despite the British parliament wanting to protect rape victims from this harrowing experience. The “right to a family life” meanwhile has been used to prevent the deportation of foreign criminals and to provide prisoners the right to donate sperm to their wives and partners.

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TEN WRONGS WITH A BILL OF RIGHTS

Bill Muehlenberg lists his arguments against an Australian Bill of Rights

The Rudd Government has established a panel to conduct an Inquiry into whether Australia should have a Bill of Rights. The panel will be chaired by Fr. Frank Brennan. The recently passed Victorian Bill of Rights seems to serve as a model of the proposed Federal version. The question is, do we need such a Charter or Bill of Rights (BoR)? I believe the answer is no. Here are ten reasons why.

One. We already have all major rights fully protected in Australia. The right to vote, freedom of speech, freedom of religion, and so on are already carefully protected rights. Australia has, through common law, various institutions and customs, and the three arms of government, a wide variety of rights already securely in place. The burden of proof must lie with those seeking change to show that major rights violations and shortcomings are currently taking place.

Two. Australian democracy already has a good safeguard of human rights in the form of its system of checks and balances. Indeed, given the merits of the existing system, there is very little public demand for a BoR, except by judicial and social activists and certain vocal minority groups. The old dictum, “if it ain’t broke, don’t fix it” applies here.

Three. Rights enshrined in a BoR become fixed and very difficult to remove. It may well be that ‘rights’ and values promoted by society today may be rejected in the future. To set in stone certain rights ignores the changing nature of societies, and overlooks the evolving nature of political culture.

In one sense no right is absolute, although rights can be arranged in an hierarchical fashion. And rights can and do conflict. Thus perceptions and opinions about rights do change over time, and a fossilised encasement of rights may in fact be a bar to the realisation of other rights.

Four. A BoR will bring major changes to how legislation and policy are made. Parliaments are meant to perform these functions, not the courts. In a BoR, major policy and legislative issues are wrested from the legislature and given to the judiciary. But important and controversial social issues deserve to be properly debated by the people via their Parliamentary representatives, not by unelected judges and bureaucrats.

The legislature is further undermined as more and more laws are seen to conflict with these chosen rights, and/or are reinterpreted in the light of this list of rights. Thus judges end up becoming legislators and policy makers, while the parliamentary process is eroded. Law is meant to be made by Parliaments, not judges. Unelected and unaccountable judges take the place of elected and accountable politicians under this arrangement. Thus the democratic process itself comes under threat.

Five. The courts become politicised and activist minority groups and special interest groups can use the courts to promote an agenda at odds with the majority. People who are willing to use the mechanism of law will increasingly determine the political landscape, instead of a duly elected Parliament.

As more tribunals and commissions are set up to enforce these rights, those found to have violated the law will not be assured of trial by an impartial body (e.g. trial by peers), but by activists and those with an agenda. Those sitting on our Equal Opportunities Commissions, and other quasi-judicial administrative tribunals, are often far from representative of mainstream opinion.

Six. A BoR will lead to even further litigation and frivolous court cases. Our already litigious society does not need to become more so. A culture of litigation in the end leads to the diminution of democracy, not its enhancement.

Indeed, we are already too prone to threaten a lawsuit at the drop of a hat. We are too inclined to blame someone else instead of shouldering some of the responsibility ourselves. A BoR will simply compound the problem. And that has been exactly the case where
countries have recently adopted a BoR, such as Canada and New Zealand.

**Seven.** The enactment of a BoR will further add to the ‘rights culture’ that is so characteristic of modern Western societies, along with a further erosion of responsibility. Everyone is demanding rights these days, but few are advocating duties and responsibilities, without which rights talk becomes empty blather.

This explosion of rights claims undermines the moral habits and virtues necessary to sustain free institutions and democratic governance. No society can long last that emphasises rights over against corresponding duties and moral responsibilities.

A BoR will certainly encourage people to demand rights, but will not be likely to enjoin them to uphold obligation and responsibility. Indeed, rights claims can be used to cover almost anything, with a never ending stream of new rights being discovered and demanded. And if the courts become inundated with rights cases, the wheels of justice may well grind to a halt. Individual responsibility, virtue and self-control are the means by which a democracy flourishes and rights are respected. A BoR cannot replace individual responsibility.

**Eight.** A BoR has not prevented human rights abuses in nations that have adopted them. Some of the most oppressive societies on earth, including the former Soviet Union, have had elaborate and exquisite BoRs. On paper these superb constitutions have covered every imaginable right, but reality has been a different story. Thus a BoR is no panacea, and can certainly offer no guarantees of a genuine promotion of rights.

**Nine.** It would appear that whatever can be achieved by a BoR can be achieved by existing means, or other less intrusive and unwelcome means. Thus if there are any glaring deficiencies in human rights in Australia (a questionable assumption for most, except for some activist minority groups), they can best be dealt with by existing mechanisms, and not by means of a new bureaucratic sledgehammer. And we must insist that any claims of such glaring deficiencies must first be demonstrated.

It would appear that whatever can be achieved by a Bill of Rights can be achieved by existing means, or other less intrusive and unwelcome means.

**Ten.** Lastly, it must be remembered that rights just do not – or should not – spring from anywhere. For the Western world at least, rights claims have been based on two fundamental sources: the Judeo-Christian worldview, and natural law. While both sources can be debated and discussed, they have provided a firm foundation on which to work for fundamental rights and justice. We dare not so readily remove the base of our Western system of law before we are sure that what we are replacing it with will make for a better foundation. And we dare not entrust such a process to social engineers, activists and those with a political agenda motivating them.

In sum, the case for a Bill of Rights contains a number of fundamental weaknesses. Prudence would dictate that we avoid radical and rapid social and political change unless it can first be proven that such change is necessary. That case has yet to be made.

First published in Quadrant Online | www.quadrant.org.au
22 December 2008
The dialogue model – as exemplified by the New Matilda Bill – as a vehicle for implementing the protection of human rights in the federal sphere, and indeed at the State level, has a number of significant weaknesses in terms of protecting human rights.

First, at the very least, there is grave doubt as to the constitutionality of its declaration of incompatibility provisions which are at the heart of the dialogue.

Second, even if those provisions are upheld, by reason of the Parliament’s inability to confer legislative power on courts exercising federal jurisdiction, an interpretive provision such as s.49(1) may often fail to protect the human rights that are exercisable under the Act.

Third, if s.4 means what it says and the “human rights in this Act are exercisable by everyone within Australia’s jurisdiction”, the New Matilda Bill will affect the interpretation of State legislation because, by reason of section 109 of the Constitution, the State laws would be inoperative to the extent that they were inconsistent with section 4. Yet there is no dialogue between the Federal courts and the State legislatures, nor constitutionally could there be.

Fourth, if the human rights referred to in section 4 only engage with federal laws, there will be a very large gap in the protection of human rights in Australia unless and until all the States and Territories adopt similar legislation.

Fifth, apart from the right of action against public authorities, the dialogue model creates no rights or causes of action.

Sixth, as a result, those whose human rights have been infringed have no remedies for infringements of those rights. They cannot obtain damages or injunctions to restrain the conduct that infringes their rights. This is a breach of Article 2 (3) of the International Covenant on Civil and Political Rights which provides that, if a person’s rights under that Covenant have been violated, that person has a right to an effective remedy. Under that Article, each State Party – and Australia is one – undertakes to ensure that any person whose rights or freedom is violated shall have an effective remedy and that the person claiming such a remedy shall have his or her right determined by a competent judicial, administrative or legislative authority, or by another competent authority provided by the legal system of the State.

Seventh, even if the Parliament amends its legislation after receiving a declaration of incompatibility, considerable time will usually elapse before anything is done. Even when the amendment has been made, it may be of no benefit to the person whose rights have been infringed.

Eighth, because courts, exercising federal jurisdiction, cannot be given legislative type powers that the courts of the United Kingdom have been using, it seems a near certainty that declarations of incompatibility will be made far more frequently in Australia than in the United Kingdom. This may have serious consequences for the work load of the Parliament. Although the Attorney-General’s response must be presented to the House of Representatives not later than six months after the day a copy of the declaration is presented to that House, there is no time limit imposed for the Parliament to take action in respect of that response.

What may have been overlooked by those who champion the enactment of a dialogue model of human rights for Australia is that what may work effectively in a jurisdiction with an unwritten constitution and a single legislature, as in the United Kingdom and New Zealand, may not work as effectively in a federal jurisdiction with a written constitution that incorporates the political doctrine of the separation of powers.

Instead of the dialogue model, the Parliament should give effect to the International Covenant on Civil and Political Rights and, if thought necessary, the International Covenant on Economic, Social and Cultural Rights by legislation.
the Parliament.

The result would be that private citizens would have judicially enforceable human rights that were not affected by State, Territory or federal legislation inconsistent with those rights and would have immediate judicial remedies for breaches of those rights. In the absence of a ‘notwithstanding’ clause, their rights would not be dependent upon whether their right was consistent with the purpose of the legislation, but would be judged and applied on its merits and by reference to the federal equivalent of s.10 of the New Matilda Bill.

A human rights legislative model on these lines would have only a minimal effect on parliamentary sovereignty. Under my preferred model, it would be open to the Parliament of the Commonwealth to insert in any federal legislation a ‘notwithstanding’ clause which required the courts to give effect to that particular legislation notwithstanding the enactment of the human rights legislation. And, of course, it would be open to the Parliament after any decision with which it disagreed to insert a ‘notwithstanding’ clause in the legislation which the court had said should be ignored in determining rights and obligations. Finally, such a model would be well within federal constitutional power and would not be open to the constitutional attacks that undoubtedly await the dialogue model.

I am conscious that my criticisms of the dialogue model will provide ammunition for those who are opposed to the enactment of any form of a Bill of Rights, statutory or constitutional. I regret that this is so. But it would be a tragedy for the human rights movement in Australia if the dialogue model was enacted and the declaration of incompatibility provisions was struck down as unconstitutional.

In that event, there would be no dialogue between the judiciary and the legislature and the executive, and, apart from the admittedly important right of action against federal public authorities, the human rights of the people of the Commonwealth would have only marginally more protection than they presently do under the common law principles of statutory interpretation. Moreover as I have pointed out, the dialogue model has other deficiencies, not the least of which is the lack of judicially enforceable remedies, except as against public authorities of the Commonwealth.

Source: The Evatt Foundation
23 March 2009 | http://evatt.org.au
Why I am opposed to an Australian bill of rights

There is no convincing reason to shift power away from parliament and into the hands of the judiciary, argues Peter Rohde

There has been a lot of discussion in the Australian media recently about the introduction of an Australian Bill of Rights. Such a bill would, presumably, enshrine into the Constitution freedoms such as freedom of speech, freedom of religion, freedom of association, and other freedoms reminiscent of what appears in bills such as the United States’ Bill of Rights. While the aforementioned freedoms are certainly essential in a modern democracy, enshrining them into the Constitution brings with it serious problems.

Under Australian law, the High Court is the sole entity with the right to interpret the Constitution. In other words, whatever is the interpretation of the Constitution by the High Court, is the final word. This represents a significant shift in the balance of power.

Take for example the freedom of speech. While this is clearly a fundamental right in any credible democracy, it may have limits. For example, should religious extremists be able to use ‘freedom of speech’ as an excuse for using their influence to incite followers to conduct extremist actions such as hate crimes or terrorist offenses.

While it is debatable whether freedom of speech should allow such actions, the point is that it must remain debatable. In other words, the public should be free to debate this issue, form a consensus, and pressure the elected representatives to pass motions based on this consensus. On the other hand, with a constitutionally enshrined freedom of speech, it becomes no longer a debatable issue which can be influenced by elected representatives or the public, but instead becomes an issue which is decided upon by unelected judges, who are accountable to no one, and whose rulings become uncontestable. Freedom of association, and other freedoms reminiscent of what appears in bills such as the United States’ Bill of Rights are a very important political and social issue. However, under the US Bill of Rights the interpretation of this amendment is left solely in the hands of the justices.

In other words, debate on this issue in the House or Senate is effectively stifled since neither have the right to influence this – only the Supreme Court does. As a result, it is presently acceptable for individuals to possess fully automatic military assault rifles, and neither the House nor the Senate can do anything about it. In a sensible democracy, issues as important as this need to be debated, and ultimately decided by elected representatives, not by unaccountable justices whose views cannot be overruled by the democratic process.

By far the most striking example of the undeserved shift of power away from elected representatives and into the judiciary, is the Roe vs. Wade decision by the US Supreme Court in 1973. In this ruling the Supreme Court ruled that a woman’s right to abortion is protected via the right to privacy of the Fourteenth Amendment. This has become one of the most cited and debated rulings in US history.

Abortion is an extremely important, contentious and dividing issue in Western societies, and it needs to be debated and acted upon accordingly. However, as was evident in this case, justices sometimes feel the need to take an activist position and interpret the constitution in ways it was never intended to be. Whether you are for or against abortion is not the issue. The point is that abortion is an extremely important topic that needs to be publicly debated and ultimately decided by the Parliament, not by the activist judiciary.

To illustrate the fact that a Bill of Rights is not absolute and is open to interpretation by the judiciary, consider a very good example – once again the US Bill of Rights. In the hands of the judiciary the US Bill of Rights did nothing to prevent slavery, nor did it prevent segregation, nor did it prevent the circumvention of habeas corpus during the War on Terror, despite the fact that under a literal interpretation of this Bill such acts would be outlawed.

A final objection to a Bill of Rights, is that it is not flexible – it cannot evolve with evolving social views. What is enshrined in the Constitution is essentially permanent, unless a referendum takes place, which is very rare. In other words, while the views of society may change, the views of the Parliament may change, but what is enshrined in the Constitution does not.

In summary, a constitutional Bill of Rights, by definition, shifts legislative power away from the Parliament and into the hands of the judiciary, which is not elected, not accountable, and whose rulings cannot be overturned. If a politician implements a bad policy, they can be voted out at the next election. When a judge makes a bad ruling, they cannot be. A Bill of Rights is not flexible, and therefore cannot change as social views change. This is a dangerous situation and represents a complete attack on our democratic process and principles.

Australia has an impeccable history of allowing freedom of speech, freedom of religion, freedom of association and protecting the rights and views of minority groups – historically, is the US better in these regards? As such there is no convincing reason to shift power away from Parliament and into the hands of the judiciary. Shifting around the power balance, in a system that has worked so well for a hundred years, is a precarious and pointless thing to do.

This article has been cross-posted at Peter Rohde’s Blog: http://peterrohde.wordpress.com

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http://blog.libertarian.org.au

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Quid Pro Quo for a Powerful Judiciary

If Australia is to have a bill of rights, judges should be more accountable, says Alan Tudge

With the exception of former High Court judge Ian Callinan and prominent QC Peter Faris, not many members of the legal fraternity are arguing against the introduction of a bill or charter of rights.

This is unsurprising as a bill of rights would shift power from the parliament to the judiciary (as Bob Carr and others have pointed out). Few, however, argue what should be the natural corollary of this shift: that judges be subject to greater accountability, particularly in the way they are appointed, evaluated and dismissed. Our democratic system demands that power and accountability go hand in hand.

Australia’s democratic system is built on the separation of powers between parliament and the courts: parliament makes law while courts interpret law. Having separate people fulfil each function is vital. But equally important is the way those people are selected.

We take for granted that parliaments should be elected. We would see it as a fundamental breach of our freedom to have it any other way. Electing parliamentarians, and hence our government, determines how major political schisms in our society are addressed.

We equally accept that judges are appointed by the government, with no public consultation and minimal debate. The appointment process focuses on identifying the best legal minds to properly interpret the law.

Judges are appointed quietly, behind closed doors, and then given life tenure to avoid any real or perceived interference by their appointors.

As Dyson Heydon noted just before his appointment to the High Court, the perfect judge is “an independent arbiter not affected by self-interest or partisan duty, applying a set of principles, rules and procedures, and possessing a measure of independence from the wrath of disgruntled governments or other groups”.

But what if judges are making law and not merely applying a set of principles, rules and procedures? In practice, of course, the separation of powers is not as strict as in theory: judges do make law through the doctrine of precedent, but only in small increments.

The introduction of a bill of rights, however, would fundamentally change this equation.

Many schisms in our society would not be decided at election time or through governments responding to public pressure, but by judges interpreting vaguely stated rights.

Constitutional law expert George Williams makes this clear when he asserts that the absence of a bill of rights is reflected in the “laws that have enabled children to be held in detention, our laws of limited free speech in the media and our anti-terror laws”. All the issues Williams raises were subject to parliamentary debate and the laws often passed with bipartisan support.

If political schisms, including the ones that Williams identifies, are to be decided by judges, then we must alter the way we hold judges accountable. This imposition of accountability could take several forms.

First, we might make judges subject to rigorous selection hearings before parliament. This process would focus on exposing the political views of judicial candidates for public examination.

Second, judicial appointments could require a parliamentary vote. This would limit the likelihood of judges with extreme views being appointed.

Additionally, judges could be granted fixed terms subject to reappointment, rather than unlimited terms. Some judges in lower courts could be directly elected by their community.

Of course, these ideas are commonplace in the birthplace of the most famous bill of rights, the US. The American Bill of Rights gives judges far greater power to make law. They have used it often, most famously upholding access to abortion in Roe v Wade through an implied right to privacy. In return, however, federal judges are subject to a rigorous Senate confirmation process in which every aspect of their life is examined for evidence of their political alignment.

The judiciary in the US is more powerful, more politised and, correspondingly, subject to more political accountability. The legal fraternity may be salivating at the prospect of enhanced judicial power that an Australian bill of rights would deliver, but it may not be as keen on enhanced political accountability.

Whether the proponents of a bill of rights like it or not, the two issues cannot be separated. It would be disingenuous and anti-democratic to try to do so.

Alan Tudge, a law graduate, was an adviser to the Howard government.

First published in The Australian Opinion, 31 December 2008

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We can’t trust judges not to impose their own ideology

A bill of rights runs the risk of government by juristocracy, argues John Gava

The history of Anglo-American constitutionalism, from which our Constitution was created, tells us two somewhat paradoxical things about a bill of rights. This applies to a bill of rights of either the legislative or constitutional kind.

This history shows us that the first bill of rights, the first 10 amendments to the US Constitution, grew organically out of that historical tradition. Bills of rights, if you like, make perfect sense within that tradition. But that history also shows us that the first bill of rights was created for an 18th-century judiciary, not the activist, instrumentalist 21st-century judiciary.

The US Constitution is the model for all modern constitutions. Yet it did not emerge out of thin air. It was the culmination of centuries of constitutional development in England and its colonies that became the US.

In very simple terms, a feudal monarchical structure evolved into one where parliament changed from being an essentially advisory body to one that assumed legislative and, most significantly, fiscal power.

In the 17th century, parliament asserted its authority over the monarch through a bloody civil war and a far less bloody deposition in 1688. During the 18th century, cabinet government developed and there was a continuous and irreversible slide of executive power from the monarch to the prime minister and his cabinet.

English constitutional history also saw during the same time the development of common law notions of the rule of law. Kings and queens came to be seen as subject to the law, not masters of it. This was a lengthy process and for a long time a strong sovereign could do in practice what they could not do in law.

However, over time judges saw their allegiance as belonging to the law and not the ruler. This was cemented when judges became fully independent of the government or sovereign of the day.

The US founding fathers took into account the history of politics in western Europe and used it to re-create what they saw as the proper form of the English constitution, which they believed had been corrupted by the king and moneymakers. The US Constitution embodied the inchoate separation of powers that existed in the English tradition and made it formal and exact. Executive power, especially the power to go to war and to dispense patronage, was vested in an elected president whose functions were uncannily like those of the English king. (The US president even today essentially wields the same powers as George III did in 1776 and has much less power in his domain than Kevin Rudd or Gordon Brown.)

At the same time the US founders also accepted the logic of such a separation by accepting that this meant that the judges had to have the ultimate say over whether the other arms of government, the executive (the president and his aides) and the legislature (the Congress, made up of the House of Representatives and the Senate) were acting within the confines of the constitution.

But this was done with an 18th-century judiciary. Attitudes to law have changed rather dramatically since then. Instead of being seen chiefly as a negative check on governments and private behaviour, law is now seen primarily in instrumental terms. For far too many judges, lawyers and legal academics, law is seen as a means to an end, a tool for achieving preconceived legal, political, economic and social goals. Indeed, US legal theorist Brian Tamanaha has argued strongly that instrumentalism is a threat to the
rule of law.

My fear is that a judicially enforced bill of rights will be abused by an activist 21st-century judiciary to further the political, social and economic agenda of judges, either of the Right or the Left.

Recent experience has shown that many of our judges now see themselves as liberated from the constraints imposed by tradition and the legal culture.

Instead, they see themselves as part of the political process and use the cases before them as means to achieve predetermined goals. Although commonly criticised as being left-wing or progressive, instrumental views of the law span the political spectrum.

For example, many Canadian commentators now believe that activist interpretations of the Canadian Charter (their bill of rights) have helped corporations and the wealthy to further their economic and social goals at the expense of the less wealthy and powerful.

A bill of rights can be a useful, if limited, tool for protecting rights and maintaining an environment where people are willing and encouraged to fight politically for what they want. A tightly controlled judicial defence of procedural rights such as the right to vote, to assemble publicly and to speak freely could only aid citizens in their political endeavours.

But a bill of rights of whatever kind can only supplement an existing culture of liberty; it cannot create one. Liberty needs a robust political environment where people argue and struggle for their rights and for the political, social and economic changes that they want.

Judges who hand down such changes from above will weaken, not strengthen, a culture of liberty. In fact, judges do not have the training or skills to engage in wider debates about social or economic policy and the courts are not appropriate institutions to carry out and evaluate the research needed for such a role.

Controversial political, economic and social questions are best resolved in the give-and-take compromises that make up political life instead of the black-and-white, I-win-you-lose structure of the courts.

Controversial political, economic and social questions are best resolved in the give-and-take compromises that make up political life instead of the black-and-white, I-win-you-lose structure of the courts.

The original Bill of Rights was created with a particular understanding of law and the role of judges. It was created in a culture where judges did not see law as politics in another guise. Unfortunately, that is not the case today.
Legislation is not the key to human rights

Don’t repeat Britain’s error in tinkering with a sensitive balance, urges John Hatzistergos

On Wednesday, as federal Attorney-General Robert McClelland was telling the UN Association of Australia that a “human rights consultation” would be undertaken, the same topic was making news in Britain. But unlike McClelland, who described the consultation as an opportunity for Australians to “share their views on how we conduct ourselves as a community that respects its people and their rights”, the latest news from London was different.

The best way to maintain human rights is to maintain the separation of power between the parliament and courts, with an emphasis on strong institutional governance ...

Tory leader David Cameron announced this week that he would repeal Britain’s Human Rights Act if he won government at the next election. This followed the announcement by Justice Secretary Jack Straw that he was examining rebalancing the rights set out in the act, saying he was “greatly frustrated” by the way judges had interpreted the law. The architect of the law 10 years ago is now quoted as saying: “There is a sense that it’s a villains’ charter or that it stops terrorists being deported or criminals being properly given publicity.” The British Government plans to issue a green paper to overhaul the act.

The London Daily Mail went further this week, editorialising in favour of Britain withdrawing from the European Convention of Human Rights, the instrument recognised by Britain’s Human Rights Act, stating: “Prisoners have abused it to demand and receive huge damages for being denied illegal drugs in jail, cashing in on a ruinous compensation culture spawned by the act and ruthlessly exploited by unscrupulous no-win, no-fee lawyers.

“Travellers and squatters have also invoked it to avoid being evicted from other people’s property, while this same legislation has prevented the police from identifying murderers on the run.

“As if this were all not bad enough, the act gravely undermines our democracy by giving unelected judges the power to make laws on hugely sensitive matters as individual privacy and the freedom of the press.”

This controversy should give us reason for pause as we consider the direction Australia should take with regard to this issue. I have no objection to a genuine consultation process on how best to protect human rights in Australia. But what McClelland was careful not to say in his announcement was any preference for the favoured option of those who supported the consultation process: the establishment of a charter of rights, which could resemble the European Convention and many such documents, including those drawn up by Victoria and the ACT.

McClelland has chosen an impressive list of names to sit on the committee to carry out the consultation. But there are lessons to be learned from the British experience.

I agree with McClelland when he says the consultation must preserve the sovereignty of the parliament. Parliaments, not courts, are better placed to decide the difficult questions of weighing up competing rights from groups that hold different values. Parliaments are institutions designed for consultation, discussion and resolution of challenging political questions. The judicial branch of government is set up in a different manner to achieve different ends, namely the adjudication of private conflicts and the application of law. When these traditional roles are blurred, both institutions suffer.

Charters have the potential to generate uncertainty about the meaning of laws and undermine the finality of legislation. I acknowledge some argue a charter of rights would promote a dialogue between the parliament and judiciary, but this is misleading. The priority of parliament must always be to maintain a dialogue with the electorate, not with another unelected government institution.

Tinkering with that balance ... can be a costly, pointless and dangerous exercise.

In my view, the best way to maintain human rights is to maintain the separation of power between the parliament and courts, with an emphasis on strong institutional governance. Tinkering with that balance, as has been shown in Britain, the birthplace of the Westminster system, can be a costly, pointless and dangerous exercise.

We do not live in a perfect society and never will. There may well be laws perceived by some in our community to be unjust. As tantalising as they sound, charters and bills, with their soaring values and protections enforced through adversarial litigation, do not present the best way forward on human rights.

John Hatzistergos is New South Wales Attorney-General.

First published in The Australian Opinion, 12 December 2008
EXPLORING ISSUES

ABOUT THIS SECTION

‘Exploring issues’ features a range of ready-to-use worksheets relating to the articles and issues raised in this book.

The activities and exercises in these worksheets are suitable for use by students at middle secondary school level and beyond.

As the information in this book is gathered from a number of different sources, readers are prompted to consider the origin of the text and to critically evaluate the questions presented.

Does the source have a particular bias or agenda? Are you being presented with facts or opinions? Do you agree with the writer?

The types of ‘Exploring issues’ questions posed in each Issues in Society title differ according to their relevance to the topic at hand.

‘Exploring issues’ sections in each Issues in Society title may include any combination of the following worksheets: Brainstorm, Research activities, Written activities, Discussion activities, Quotes of note, Ethical dilemmas, Cartoon comments, Pros and cons, Case studies, Design activities, Statistics and spin, and Multiple choice.

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Brainstorm, individually or as a group, to find out what you know about human rights and civil liberties.

1. What are human rights?

2. What are the five fundamental freedoms of living in Australia?

3. Define the following terms and consider how their meanings differ from one another.
   - Civil and political rights ("first generation rights"): 
   - Economic and social rights ("second generation rights"): 
   - Environmental, cultural and developmental rights ("third generation rights"): 

Complete the following activities on a separate sheet of paper if more space is required.

1. Briefly explain these forms of discrimination and name the relevant Commonwealth legislation:

   **Racial discrimination:**

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   **Federal racial discrimination legislation:**

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   **Sex discrimination:**

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   **Federal sex discrimination legislation:**

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   **Disability discrimination:**

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   **Federal disability discrimination legislation:**

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   **Age discrimination:**

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   **Federal age discrimination legislation:**

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1. Explain the role and functions of the Australian Human Rights Commission.

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2. Explain the role and functions of the relevant Equal Opportunity or Anti-Discrimination Commission in your state or territory.

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The Universal Declaration of Human Rights makes it clear that human rights violations involve not only civil and political rights, but also economic, social and cultural rights. Thus, if Australian society is analysed in the light of the provisions of the Declaration, we can see that there are many human rights issues that need to be addressed. Discuss Australia’s existing human rights record in relation to the following vulnerable groups:

- People living in poverty

- Indigenous people

- Asylum seekers

- Migrants from non-English speaking backgrounds

- People with a disability
After reading each of the following statements, consider your own position on the opinions expressed and explain why you agree or disagree. You may wish to discuss the statements in pairs, or use them as starting points for group debates.

1. Observance of human rights, in Australia and abroad, benefits the security and prosperity of all nations and individuals. (Department of Foreign Affairs and Trade, p.11)

2. Australia needs, at the very least, a Human Rights Act that includes civil, cultural, economic, political and social rights, an Act that forces legislators, policy-makers and decision-makers to take treaty rights into account. Until then, Australia will still have much to do about rights. (Robyn Seth-Purdie, p.17)

3. Australia should be held to a high human rights standard. We tout ourselves as a ‘principled advocate of human rights for all’ and are a highly developed and democratised country. Despite this, we are as well known internationally for Aboriginal disadvantage and our treatment of asylum seekers as we are for barbecues and beaches. It is time for change. (Phil Lynch, Human Rights Law Resource Centre, p.18)

4. Ultimately Australia will require a Human Rights Act to set workable limits on how far ajar the door of human rights protection should be opened by the judges in dialogue with the politicians. (Fr Frank Brennan, p.25)

5. Australia is now the only common law country in the world without a bill of rights. The UK and New Zealand now both have statutory Bills of Rights. Canada, Fiji, India, South Africa and the United States have constitutional Bills of Rights. (Australian Bill of Rights Initiative, p.26)

6. Not all Australian citizens enjoy adequate protection of fundamental human rights. This inadequacy of protecting human rights of all citizens, in particular, the rights of asylum seekers and the individual and collective rights of Indigenous Australians, presents a compelling case for the introduction of a bill of rights. (Australian Bill of Rights Initiative, p.27)

7. Ultimately, major reform in a contentious area like human rights is not easy. Division might be undesirable but it is probably inevitable. (Edward Santow, p.29)

8. There will be no charter of rights because there’s no crisis of rights in Australia. If the public believed the executive arm of government were stifling freedoms, Australia slipping behind other democracies, there would have been a decided shove towards a human rights act. (Bob Carr, p.36)

9. Bills of rights are expressed in vague language that gives rise to uncertainty in how citizens and governments ought to comply with the law. While we may agree that the principle of ‘freedom of expression’ is a good idea, under a bill of rights this idea always turns on specific cases like the regulation of tobacco advertising, the balance in defamation law or the prohibition of hate speech. (Julian Leeser, p.38)

10. Australia has an impeccable history of allowing freedom of speech, freedom of religion, freedom of association and protecting the rights and views of minority groups – historically, is the US better in these regards? As such there is no convincing reason to shift power away from Parliament and into the hands of the judiciary. Shifting around the power balance, in a system that has worked so well for a hundred years, is a precarious and pointless thing to do. (Peter Rohde, p.43)

11. Unless we have judges who will apply the law in a traditional manner and who avoid the temptation of becoming agenda-driven political players, a bill of rights runs the risk of government by juristocracy. (John Gava, p.46)

12. We do not live in a perfect society and never will. There may well be laws perceived by some in our community to be unjust. As tantalising as they sound, charters and bills, with their soaring values and protections enforced through adversarial litigation, do not present the best way forward on human rights. (John Hatzistergos, p.47)
Compile a comprehensive list of arguments for and against the introduction of a Bill of Rights in Australia. You may use the article ‘Arguments for and against a bill of rights’ (George Williams, p.25) as a starting point. You may choose to expand your arguments by citing opinions expressed in this book.

1. Arguments FOR an Australian bill of rights

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2. Arguments AGAINST an Australian bill of rights

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Complete the following multiple choice questionnaire by circling or matching your preferred responses. The answers are at the end of this page.

1. Human rights are NOT (circle 4 answers):
   a. Universal  
   b. Flexible  
   c. Optional  
   d. Essential  
   e. Inherent  
   f. Hereditary  
   g. Inalienable  
   h. Invulnerable

2. Select from the following countries those which have already adopted a bill of rights (statutory or constitutional):
   a. United States of America  
   b. New Zealand  
   c. Fiji  
   d. Canada  
   e. Norway  
   f. India  
   g. United Kingdom  
   h. South Africa

3. Select true or false for the following phrases:
   a. The legal protection of human rights in Australia depends on a combination of the common law and statute law. Statute law is legislation of state parliaments.  
   b. The Commonwealth Government has the responsibility for ensuring Australia's observance of internationally-recognised human rights.  
   c. In 2010 the Australian Government committed to adopting a human rights act.  
   d. State governments have the responsibility to make and administer many of the laws that are relevant to human rights observance.

4. Human rights are often defined in different ways. Which of the following definitions do NOT refer to human rights
   a. the recognition and respect of peoples dignity  
   b. a set of moral and legal guidelines that promote and protect a recognition of our values, our identity and ability to ensure an adequate standard of living  
   c. standards of equality determined by a combination of popular vote and government legislation  
   d. the basic standards by which we can identify and measure inequality and fairness  
   e. those rights associated with the *Universal Declaration of Human Rights*  
   f. a framework of rights enshrined in the anti-discrimination laws of every country

MULTIPLE CHOICE ANSWERS
1. b, c, f, h  
2. a, b, c, d, f, g, h  
3. a = false, b = true, c = false, d = true  
4. c, f.
The legal protection of human rights in Australia depends on a combination of the common law and statute law. (p.1)

In the common law, traditional freedoms are protected by centuries of custom and the precedents set by previous court decisions. (p.1)

The Universal Declaration of Human Rights makes it clear that human rights violations involve not only so-called civil and political rights, but also economic, social and cultural rights. (p.2)

The main human rights treaties that have been specifically incorporated into domestic Australian law are: International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Racial Discrimination Act 1975 (Cth); Sex Discrimination Act 1984 (Cth); Crimes (Torture) Act 1988 (Cth). (p.2)

Australia has a national Human Rights Commission and each state and territory has Equal Opportunity or Anti-Discrimination Commissions. (p.3)


The British Bill of Rights was adopted in 1689 and ensures that royalty cannot override laws created by a freely-elected Parliament. (p.4)

Enacted in 1776, the US Declaration of Independence proclaims that 'all men are created equal' and endowed with certain inalienable rights. (p.4)

The Commonwealth of Australia was established in 1901.

The protection of human rights in Australia is left to state and federal parliaments, not the courts. (p.5)

On 10 December 1948, the UN General Assembly adopted the Universal Declaration of Human Rights. (pp.6,8)

The Constitution specifically protects certain rights and freedoms, including trial by jury in specified circumstances, the free exercise of any religion, and just terms for acquisition of property. (p.11)

Under the Racial Discrimination Act 1975, it is unlawful to discriminate against any person by reason of that person's race, colour, descent, or national or ethnic origin. (p.12)

Australia played a leading role in the development of the international human rights system and is a party to 6 major UN human rights treaties. (p.13)

The Sex Discrimination Act 1984 aims to eliminate discrimination and sexual harassment on the basis of gender. (p.13)

The Disability Discrimination Act 1992 makes disability discrimination unlawful for people with disabilities in many aspects of public life. (p.13)

The Age Discrimination Act 2004 protects individuals from discrimination on the basis of age in many parts of public life. (p.13)

The Freedom of Information Act 1982 gives every person the right to access information in the possession of the federal government and its authorities, with exemptions such as Cabinet papers. (p.15)

All Australians are entitled to freedom of speech, association, assembly, religion, and movement. (p.14)

Despite the well-entrenched system of compulsory voting, only some 84% of the eligible adult population is enrolled to vote. (p.15)

The Australian Government committed to give consideration, and respond by June 2011, to 145 recommendations made by the international community in the Universal Periodic Review (UPR) process to improve Australia's human rights performance. (pp.18-19)

On 21 April 2010, the Attorney-General launched Australia's Human Rights Framework which outlines a range of key measures to further protect and promote human rights in Australia. (p.21)

On 2 June 2010, the Human Rights (Parliamentary Scrutiny) Bill 2010 was introduced into Parliament. (p.21)

Australia is the only common law country that does not have some form of national charter or bill of rights. (pp.23,26)

Within Australia, the ACT was the first territory to enact its own Human Rights Act in 2004. Victoria followed in 2006 with its Charter of Human Rights and Responsibilities Act. (p.23)

The UK and New Zealand both have statutory Bills of Rights. (p.26)

Canada, Fiji, India, South Africa and the United States have constitutional Bills of Rights. (p.26)

25 years ago, sex discrimination laws were opposed by large numbers of the Australian community. (p.29)

Just over 60 years ago, Labor Attorney-General and Foreign Minister Herbert ‘Doc’ Evatt presided over the UN General Assembly as it adopted the historic Universal Declaration of Human Rights. (p.31)

48 nations voted in favour of the Universal Declaration of Human Rights, none against. (p.31)

Under Australian law, the High Court is the sole entity with the right to interpret the Constitution. (p.43)

A Bill of Rights is not absolute and is open to interpretation by the judiciary. (p.43)

The US Bill of Rights did nothing to prevent slavery, segregation, or the circumvention of habeus corpus during the War on Terror, despite the fact that under a literal interpretation of this Bill such acts would be outlawed. (p.43)

Australia’s democratic system is built on the separation of powers between parliament and the courts: parliament makes law while courts interpret law. (p.44)

The American Bill of Rights gives judges far greater power to make law than the Australian judiciary. (p.44)
**Bill of rights**
There are two types of bills of rights. A constitutional bill of rights is incorporated into the Constitution itself. The advantage of having such rights written into the Constitution is that they are ‘entrenched’ and cannot be amended or removed by any government without the overwhelming approval of the people voting at a referendum to amend the Constitution. A statutory bill of rights is just like any other legislation government may enact. The rights contained in legislation, are not entrenched, and may be amended or repealed by any government.

**Civil liberties**
Civil liberties provide an individual with specific rights and freedoms such as the right to freedom of speech, association, religion, movement and assembly. Many modern states have a constitution, a bill of rights, or similar constitutional documents that enumerate and seek to guarantee civil liberties. Other states have enacted similar laws through a variety of legal means, including signing, ratifying or otherwise giving effect to key international rights conventions such e.g. *International Covenant on Civil and Political Rights*. The existence of some claimed civil liberties is a matter of dispute, as are the extent of most civil rights.

**Civil rights**
The rights of citizens to equality and liberty. Sometimes referred to as ‘first generation’ rights, civil rights include freedom to worship, to think and express oneself, to vote, to take part in political life, and to have access to information.

**Collective rights**
The rights of groups to protect their interests and identities.

**Convention**
A binding agreement between states. The term is used synonymously with ‘treaty’ and ‘covenant’, although conventions are stronger than ‘declarations’ because they are legally binding for governments that have signed them. When the UN General Assembly adopts a convention, it creates international norms and standards. Once a convention is adopted by the General Assembly, member states can then ratify the convention, promising to uphold it. Governments that violate the standards set forth in a convention can then be censured by the United Nations.

**Covenant**
A covenant is a binding agreement between states, and is used synonymously with ‘convention’ and ‘treaty’. The major international human rights covenants (both passed in 1966) are the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

**Cultural rights**
The right to preserve and enjoy one’s cultural identity and development.

**Economic rights**
Rights that concern the production, development, and management of material for the necessities of life.

**Human rights**
The rights people are entitled to simply because they are human beings, irrespective of their citizenship, nationality, race, ethnicity, language, sex, sexuality, or abilities. Human rights become enforceable when they are codified as conventions, covenants, or treaties, or as they become recognised as customary international law.

**International Bill of Human Rights**
The combination of the Universal Declaration of Human Rights, the *International Covenant on Civil and Political Rights* and its optional protocol, and the *International Covenant on Economic, Social and Cultural Rights*.

**Legal rights**
Rights that are laid down in law and can be defended and brought before courts of law.

**Moral rights**
Rights that are based on general principles of fairness and justice and are often, but not always, based on religious beliefs. People sometimes feel they have a moral right even when they do not have a legal right, e.g. during the United States civil rights movement protesters demonstrated against laws enforcing racial segregation between blacks and whites at the same schools, on the grounds that these laws violated their moral rights.

**Natural rights**
Rights that belong to people simply because they are human beings.

**Political rights**
The rights of people to participate in the political life of their communities and society, such as voting for their government.

**Protocol**
A treaty that modifies another treaty (e.g. adding additional procedures or substantive provisions).

**Social rights**
Rights that give people security as they live and learn together, such as in families, schools and other institutions.

**Treaty**
A formal agreement between states that defines and modifies their mutual duties and obligations; used synonymously with ‘convention’. When conventions are adopted by the UN General Assembly, they create legally binding international obligations for the member states who have signed the treaty. When a national government ratifies a treaty, the articles of that treaty become part of its domestic legal obligations.

**Universal Declaration of Human Rights**
Adopted by the General Assembly 10 December 1948, the UDHR is the primary United Nations document establishing human rights standards and norms. Although intended to be non-binding, over time its provisions have become so respected by states that it is regarded as customary international law.
Websites with further information on the topic

Australian Human Rights Commission  www.humanrights.gov.au
ACTNOW  www.actnow.com.au
Amnesty International Australia  www.amnesty.org.au
Australian Bill of Rights Initiative  http://abri.org.au
Australian Human Rights Centre  www.ahrcentre.org
Australian Lawyers Alliance  www.charterpetition.com.au
Civil Liberties Australia  www.cla.asn.au
Human Rights and Responsibilities Australia  www.humanrights.org.au
Human Rights Council of Australia  www.hrca.org.au
Human Rights Law Resource Centre  www.hrlrc.org.au
National Human Rights Consultation  www.humanrightsconsultation.gov.au
New South Wales Council for Civil Liberties  www.nswccl.org.au

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