

JustComment

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Protecting All Human Rights in Australia!

In the wake of the Bali bombing in October 2002, several Australian cities witnessed military-style raids on the homes of Indonesian families living in Australia. This action was conducted by ASIO under Australia's existing anti-terrorism legislation. Such raids have been criticised as a serious infringement on civil liberties and a dangerous precedent of racial profiling. Human rights can be easily disregarded when fear is ignited in the community.

Furthermore, in Australia, the particular rights of groups such as Aboriginal and Torres Strait Islander people, asylum seekers, people with disabilities, gay and lesbian people, detainees and homeless people, can be overlooked by other Australians. In light of this, it is legitimate and important to question Australia's protection of human rights and whether or not Australia should have a Bill of Rights.

What is a Bill of Rights?

A Bill of Rights is a formal statement of fundamental rights and privileges such as the freedom of opinion and expression, guarantees of fair trial, the right to vote, the freedom of the press, the principle of non-discrimination on grounds of race, religion or gender. It can be enshrined into the Constitution, and thereby give the courts the power to strike down legislation found to violate human rights. A Bill of Rights is sometimes also introduced into legislation, merely prescribing for the courts to inter-

pret law consistently with the provision of the Bill. There are many options possible concerning legislative and constitutional change. For example, a Bill of Rights with the power to strike down legislation, which is also subject to the possibility of legislative override, would act as a "safety valve". Canada chose to introduce a statutory (legislative) Bill of Rights, which was upgraded to constitutional force after a few years, once the public got accustomed to its functions and effects. Australia is now the last Commonwealth country without a proper Bill of Rights.

What are Australia's current human rights guarantees?

Although Australia does not have a formal Bill of Rights, some human rights provisions are included in the Constitution. For example, freedom of religion (section 116), non-discrimination against Australians in different States (section 117), or right to trial by jury (section 80). These are only scattered provisions that do not amount to a charter of human rights.

Recently, the High Court introduced a doctrine of "implied rights," finding that certain constitutional rights can actually be inferred from those rights already enshrined in the Constitution. However, there are questions about whether the control of such rights should rest with the people and their elected representatives.

Australia has also signed a variety of international instruments of human rights, most notably the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural



Rights (ICESCR) and the Convention on the Elimination of all Forms of Racial Discrimination (CERD). These instruments are not directly applicable in Australian courts, but under international law the High Court must take them into consideration when interpreting legislation.

The Australian Parliament has introduced human rights legislation such as the Racial Discrimination Act 1975 (Cwlth), the Sex Discrimination Act 1984 (Cwlth), the Disability Discrimination Act 1992 (Cwlth) and most recently the Human Rights (Sexual Conduct) Act 1994 (Cwlth). Such legislation has the power to override State legislation, and regulate the relations between individuals as much as they govern relations between the citizens and the State. However, they are still deemed insufficient to fulfil Australia's obligations under ICCPR and ICESCR. Legislation is also vulnerable to amendment or repeal by future Australian legislatures.

Finally, certain bodies have been established to specifically monitor the implementation of human rights in Australia. The most prominent is the Human Rights and Equal Opportunity Commission (HREOC), established in 1986 and responsible for the implementation of the three Discrimination acts. In addition, the Senate Committee for the Scrutiny of Bills is to determine whether proposed bills trespass unduly on personal rights and liberties, and the Federal Privacy Commissioner is entitled to receive complaints relating to the 1988 Privacy Act.

Is the current protection of human rights adequate?

Despite a perception that Australia's human rights record is generally good, criticism has been voiced by HREOC and United Nations bodies overseeing the implementation of international human rights treaties, as well as local and international non-governmental organisations such as Amnesty International. Human Rights Watch in New York recently pointed to human rights violations in reference to Australia's treatment of asylum seekers.

An example of concern: the ASIO laws

In March 2002, Attorney-General Daryl Williams introduced to Parliament his Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill, as part of the government's package of counter-terrorism legislation. However, a joint Government and Opposition committee subsequently slammed the bill as unconstitutional and an attack on civil liberties, and the Bill was referred to a Senate committee. The legislation would allow citizens to be held incommunicado without charge for indefinite periods, and remove any protection against self-incrimination and the right to silence. Children as young as 12 could be detained, strip-searched and questioned. Despite criticism, this Bill has been revived in the wake of the Bali bombing and it is expected that it will be brought before parliament again in the near future.

Other key areas of concern include:

- Indigenous self-determination;
- Native title and heritage protection;
- Stolen generations;
- Ongoing disadvantage of Australia's Indigenous people in terms of social, economic and cultural rights;
- Effective implementation of international human rights instruments;
- Mandatory sentencing;
- Deportation of people risking torture or summary execution;
- Mandatory detention of unauthorised arrivals;
- Anti-terrorism laws and infringement on civil liberties.

Despite all the merits of a parliamentary democracy, it appears that the current system does not offer adequate protection to all groups in Australian society. Governments can be influenced to endorse unacceptable restrictions of human rights in times of perceived crisis for the national interest, such as the aftermath of the September 11 terrorist attacks on the United States or the Bali bombing. Furthermore, concern is often voiced that the Australian's should be more conscious of their rights and a Bill of Rights would be a valuable educational tool.

In the United Kingdom, belief was long held that parliamentary democracy offered sufficient guarantees of fundamental rights. But the United Kingdom is also bound by the European Convention of Human Rights, and from 1966 to 1998 it was found in breach of the convention more often than any other European State. This realisation prompted the United Kingdom to enact a Bill of Rights in 1998, in order to repatriate human rights and avoid the high cost of the European procedure.

How could the protection of human rights be improved?

There are several ways in which the protection of human rights could be enhanced in the Australian legal system. The most prominent proposal is certainly the introduction of a Bill of Rights,

whether entrenched (constitutional) or statutory (legislative). Australia could also upgrade its existing anti-discrimination legislation to constitutional force, in order to give it greater strength. But in light of the particular problems faced by Australia's Indigenous population with regards to human rights, the question of a treaty or treaties between the Australian federal government and Indigenous people deserves a more prominent place in the debate on human rights and constitutional change.

One of the major areas of concern in Australia is indeed the lack of respect for Indigenous economic, social and cultural rights, as well as problems of discrimination both in the judicial system and in the society in general. A treaty or series of agreements focused on Indigenous rights would change the relationship between Indigenous and non-Indigenous Australians, suggesting a new partnership. It is in the interests of all Australians to better understand the rights agenda.

Just Action

- Do you know about your rights?

Human rights are also your rights. Read the 1948 Universal Declaration of Human Rights, a short and concise document outlining the major rights to which every human being is entitled.

(<http://www.un.org/Overview/rights.html>)

- How are human rights protected in your state? In ACT, public consultations are currently carried out to determine the form and content of a potential Bill of Rights for the territory. Find out more information about this project on: <http://www.act.gov.au/rights/>
- Find out more information on the debate about a bill or rights in Australia from the University of New South Wales: <http://www.gtcentre.unsw.edu.au/bills-of-rights-resources.html>



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