

## The content of an Australian Bill of Rights

Sev Ozdowski\*

I would first like to acknowledge the Gadigal people, the traditional custodians of the land on which the Conference is held. I will advance three propositions:

1. that contemporary Australians take their rights for granted and do not know them well;
2. that civil liberties are essential if one wants to remain competitive in the global economy, and
3. the Australian people need a Charter of Customers' Rights to re-establish their trust in the political process; or as some commentators put it: promote the development of 'social capital'.

The Federal Government's package of 'Anti-Terror Bills' and especially the 'ASIO Bill' has certainly focused the need for close attention to these issues as never before. As my narrative will explain shortly, unlike many of you here today, I have no direct understanding of the Petrov Affair or Australian Security Intelligence Organisation (ASIO) surveillance of anti-Vietnam demonstrations in the 1970s, nevertheless my upbringing has imbued me with a healthy scepticism for the Executive's use of 'intelligence services'.

Prior to September 11, the issue of an Australian Bill of Rights for me fell into the category of useful but not essential. Now that the Australian Government is getting serious about 'the war against terrorism', as evidenced by this legislation, I feel the issue now falls into the category of absolutely vital. They say that nothing concentrates the mind better than knowing that one will be hanged in the morning; well this is our collective 'wake up call'.

### Personal background

But before advancing these arguments, allow me to start with a few personal details so you understand better where I am coming from.

---

\* Dr Sev Ozdowski OAM is the Human Rights and Equal Opportunity Commission (HREOC) Human Rights Commissioner.

I am an Australian. I speak with an accent as I was not born here.

I was born in post-war Poland to a strong Catholic family. My early memories are of ruins, shortages and Stalinist oppression. I witnessed the Poznan insurrection of 1956. My early memories are also of stories of an independent, pre-war Poland and of struggles against Nazi occupation.

My formative years coincided with the reigns of Nikita Khrushchev, John Kennedy and Pope John XXIII and his Vatican Congress. There were also echoes of Woodstock and the Beatles; of Martin Luther King and Fidel Castro; of the first sputniks with Lajka, Gagarin and others.

This was a time of battle of ideologies. But this was also a time of hope. Young Poles like me hoped that the communist system imposed on us would gradually change. I became involved with forces working for that change.

My reality check came in 1968. With the brutal suppression of the March 1968 student movement (in which I participated), the invasion of Czechoslovakia in August 1968 and the collapse of the communist economy — all hope was gone.

The December 1970 shipyard workers' riots, with the consequent enhancement of the police state in Poland (ironically fuelled by western financial credits), only confirmed my feelings that the communist system could not be reformed.

It also appeared at that time that the system, despite its totalitarian nature and inefficiencies, would last forever. So, it was time to go.

In 1973 my wife and I escaped to West Germany. After two years of waiting we arrived in Sydney.

We chose Australia because of its fine democratic credentials and successful capitalist economy. We also looked for a 'new' society open to newcomers. Perhaps the Australian climate was also seen by us as providing an advantage over the Canadian option!

### **Ideas brought to Australia**

We arrived here with the proverbial 'one suitcase' and a range of beliefs, or what may sometimes be called biases, resulting from our past experience. These included:

- a strong distrust of any ideology and fundamentalism;
- an awareness of the limitations of government (especially of its well intentioned

economic policies);

- a healthy dose of pragmatism;
- the belief that our freedoms and economic well-being can only flourish in a democratic society; and
- a strong focus on individual responsibility and a drive to join the new society.

My experience in Australia has added two other 'biases' to the above list.

One is a strong sense of egalitarianism. And the other is a belief that our cultural diversity works to Australia's advantage and that good people come in all colours.

But in recent times I have come to the view that Australia's democratic safeguards need, shall I say, 'freshening up' if we are to retain a position as one of the foremost libertarian countries in the developed world.

But what do average Australians think about their current human rights culture?

### **Australian human rights culture**

The answer to that question is simply: not very much!

When I address different community meetings across Australia I am often being asked basic questions about our human rights. Some people do not even know that we have a Constitution. On occasions I am told that human rights are undemocratic and even un-Australian, because they are imposed on us — in violation of Australian sovereignty — by the United Nations, which in turn is portrayed as an unaccountable world government.

Very few Australians know that our country is usually involved in drafting any UN human rights instrument; that each convention needs to be signed and ratified; and that, even then, it has no domestic legal status unless conferred by specific domestic legislation.

### ***Equality rules supreme***

However despite the lack of detailed knowledge of their human rights, Australians have a very strong sense of social justice. We have a 'fair go' culture. Australians know what is 'fair' and how the national cake should be divided.

And those egalitarian aspirations have been enshrined by legislation since Federation.

### *Economic rights*

In fact, Australia's particular achievement has been the development of a comprehensive system of protection of economic and social rights. Its foundations were put in place well before the Bolshevik revolution and long before we ratified the UN Covenant on Economic, Social and Cultural Rights in 1975.

Economic rights for adult European males were strongly supported with the introduction of the conciliation and arbitration system in 1904 and sealed by the *Harvester Decision* of 1907.

These examples provide evidence of Australia's historical capacity to box above its weight, especially in the development of international rights and modelling of world's best practice. However, it makes the Government's current bashfulness regarding UN conventions even more anomalous; but more of that later.

### *Social equality — anti-discrimination measures*

Since the 1970s, incorporation of international human rights into domestic legislation has focused on measures to ensure greater opportunity for social equality.

By now we have federal statutes prohibiting racial, sex and disability discrimination, and recently the Government has proposed to develop age discrimination legislation.

Australians however do not have a similar focus on civil and political liberties.

The prevailing wisdom is that our system of democratically elected governments, with an independent judiciary and free press, is the best protector of individual rights.

From this emerges the current theme that we do not need a Bill of Rights to protect our civil and political liberties. The recent NSW parliamentary committee inquiry into the issue went even one step further by asserting that a Bill of Rights would positively harm public good.

And there are good historical reasons for such a culture. The Australian Federation was not forged in war or revolution and white Australians have no history of struggle against massive human rights abuses.

Nations established in violence have been much more likely to entrench those hard won liberties in their legal system. But that is not the experience of Australia.

The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) also reflects this culture. There is a stark contrast between remedies available in race, sex and disability discrimination versus remedies in civil and political rights. The courts can adjudicate on equality complaints when the Commission's conciliation fails. But no court can award a remedy to civil and political rights violations under the *Human Rights and Equal Opportunity Commission Act*.

### ***To sum up — the Australian human rights culture***

To sum up, the Australian contemporary human rights culture is strong in terms of protection of equality rights but weak on civil liberties.

Or to use Brian Galligan's<sup>1</sup> words: 'The tendency of Australian democracy was towards equality (except of course for Aborigines) rather than individual liberty — levelling down as well as up to standardise material circumstances' (Galligan 1994: 59).

This reminds me of a story somebody told me after he visited the Sydney Fish Market. There was a man selling crabs. He had two baskets with crabs. One basket had its top open and the second basket was covered by a net over its top.

The man was asked why this difference. Why is only the second basket covered?

He replied with a smile: 'It's simple. The crabs in the first basket are local. The other are imports. You see, our local crabs in the first basket pull each other down, so no one escapes. The foreign crabs don't pull each other down. On the contrary, they climb over each other to escape. If I took the net off, there would be only few of them left for cooking.'

### **Protection of individual liberties internationally**

In fact, our relative neglect of civil and political liberties puts us at odds with other first world countries with which we traditionally compare ourselves.

For example, the legal protection of individual liberties in the US is far superior because of its constitutional Bill of Rights. It has been the subject of many books and films. A similar case is the European Union, which is a world leader in protection of human rights.

---

1 Professor, Division of Politics and Economics, Australian National University.

And there is a clear trend toward better protection of civil liberties in other first world countries. Canada adopted its *Charter of Rights and Freedoms* in 1982 and New Zealand its Bill of Rights in 1990.

Even 'Mother England' adopted a *Human Rights Act* in 1998, despite the previously held view that the common law adequately safeguarded human rights.

### **Impact on Australia of inadequate protection of civil liberties**

The lack of adequate legislative protection of civil liberties in this country is now bringing a range of negative consequences to Australia.

To start with it may result in the erosion of existing civil liberties.

Lack of a statutory statement means there are no clear benchmarks to follow. It makes both enforcement through the courts and civic education difficult. It allows executive power to grow.

The effect of this was particularly evident in the recent examination by the Senate's Legal and Constitutional Legislation Committee of the suite of six 'Anti-Terror Bills', and in passing let me congratulate that Committee on its outstanding recommendations, as well as those people here today for the quality of your submissions to that body.

But imagine how much easier it would have been to gauge the likely effect of those Bills had there existed a legislative benchmark of 'civil liberties' against which measurement could be made.

Another example: the rule of law is an important foundation of our society. It means that disputes are determined under the law by independent judges. It provides for the supremacy of law over administrative actions. But the legislation passed by the Parliament in the context of the Tampa crisis abolished judicial review of many Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) decisions under the *Migration Act 1958* (Cth). So some asylum seekers are not permitted their day in court.

As you all know, the 'privative clause' is now before the Federal Court and in an exchange between the Chief Justice and the Solicitor General the proposition was put from the Bench that the effect of this clause was to make the provisions of the *Migration Act 1958* (Cth) mere 'guidelines' and accordingly incapable of any judicial review; the Solicitor-General replied in the affirmative, adding that this was the Parliament's clear intention and respectfully the Bench better get used to it. To paraphrase: 'I doubt that even Solomon in all his glory was arrayed with powers such as these!'

## **Absence from international human rights law developments**

This neglect of civil and political liberties from our domestic agenda is made even more surprising by the fact that there is an increasing trend towards international goal setting. Put bluntly this means that if we don't involve ourselves in the process, we could find ourselves disadvantaged by the outcome. A proposition clearly understood by the current Government as shown by its total engagement with the 'Kyoto' process and successive World Trade Organization decisions.

By way of overseas example, Britain's decision to adopt a *Human Rights Act* in 1998 was partly motivated by the desire to allow British judges to have a greater influence on the case law. It was rightly believed that the adoption of the *Human Rights Act* would influence the European Court of Justice in Strasbourg and, in turn, the European Court would gain a greater understanding of customs, laws and procedures throughout the UK.

The simple message here is that globalisation means 'participate or get left behind'. This also applies to human rights law.

## **Expect Australian courts to develop protections**

The lack of legislation defining our civil liberties means our courts are left with developing common law in this area. For example, the Australian High Court in 1995 in *Teoh* said that public officials must take rights under the UN Conventions ratified by Australia into account where the convention right is not clearly excluded by domestic law.

But the courts should not have a determining role in public policy beyond their responsibility to interpret the laws as laid down by Parliament.

Therefore, it would be more satisfactory if this process was developed by Australian legislation, drawn from an appropriate mix of UN Conventions and reflecting the Australian experience.

In time this would produce a body of Australian human rights jurisprudence which would influence international thinking on these subjects.

## **Lack of individual protections impacts on our economy**

One of the key questions for Australia, however, is whether our lack of focus on individual freedoms suppresses Australia's competitiveness in a globalised economy? Remember my crab story.

## **International evidence**

There is an enormous body of evidence showing that the importance of the individual in any State must never be underestimated, especially in economic terms.

For example, few of us would realise the enormous economic importance of the Magna Carta of 1215. This restricted the royal power and prohibited kings from levying taxes without the agreement of Parliament. According to Roger Sandall 'kings could no longer freely wage war and pay for it later by seizing the wealth of their subjects' (Sandall 2001: 140). This clearly led to accumulation of wealth by individuals and restraining of state power.

A current example is the most successful contemporary world economy, the US. It is characterised by a minimum of State interference. Individual freedoms are encouraged, giving rise to 'can do' capacity, innovation and collective reward. Protections are provided by the US Constitution with its Bill of Rights which allows individuals aggressive pursuit of their rights through legal action.

In the case of my personal experience, the total inability of the communist state to utilise individual enterprise, innovation and aspirations was undoubtedly one of the more significant causes of its failure.

In other words, individual enterprise and innovation are one of the key factors in the history of economic development. To put it simply, they tend to flourish in the culture of freedom.

## **Focus on Australia**

When focusing on Australia, one could say that by and large up until the late 1960s the equality system referred to earlier in my speech (as compared to individual rights) worked reasonably well for most white Australians.

But the last 30 years have produced massive structural changes in the way business, both domestic and international, operates. Australians find themselves confronting situations where individuality has assumed far greater importance. Just think about labour market changes alone. When I joined the public service in 1980 I joined it for life. Wage centralisation was paramount. Nobody works in the public service for life any more and most are on individual performance based contracts.

At the same time, traditional protections have weakened. Trade union membership is declining.

Governments of all persuasions are vacating traditional roles and pulling back to basic service provision of health, education and law and order.

It may well be that Australia is becoming more competitive internationally BUT where are the individual's rights protected?

This loss of traditional protection is not well perceived by many Australians who feel threatened by the changing trends. To them economic rationalism means loss of control over individual destiny. This partly explains the attraction of Pauline Hanson — who seemed to articulate the fears of many ordinary Australians, but failed to provide answers.

Also our political process no longer provides the kind of protection and assurance that it once might have.

The dominance of the major political parties and the rigidity of their discipline undermine the prospects of individual protection at the parliamentary level. Take for example the 'Anti-Terror Bills'. It took considerable courage in the party room for Marise Payne, Bronwyn Bishop, Petro Georgiou, Bruce Baird and Christopher Pyne, and I base that list on newspaper reports, to move for extensive amendments to the Bills; but the system should not depend for its workability on extraordinary acts of political courage.

The judiciary is effective *but* limited as Brennan J said in *Mabo*:

In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency (Brennan J in *Mabo v Queensland (No. 2)* 1992 at 29).

The media, using a 'squeaky wheel' approach, is still capable of championing individual causes. This is because it has the ability to mould public opinion and impact on decision makers.

But change via media is necessarily a haphazard approach to public policy and to the protection of human rights.

### A 'black hole'

So I put it to you that there is a 'civil liberties black hole' at the heart of this issue.

All systems need harmony to produce optimal outcomes and harmony requires checks and balances. It is evident that in contemporary Australia the capacity for individuals to protect their rights is severely depleted.

This condition is not widely understood, but its effects are. The result is that people become change and risk averse as they find themselves more and more affected by trends beyond their control.

The nub of the argument is that we have been so busy dismantling the old ways in our drive for efficiency that we have neglected to erect appropriate new safeguards.

### **The time is right for change**

Examination of available public opinion data on human rights suggests that there are significant changes emerging that would enable us to fix the 'black hole'.

It suggests that Australians are growing more comfortable with the notion of civil rights and freedoms. In opinion surveys over the last decade or so, Australians have overwhelmingly agreed on various rights as fundamental. Some of them received 100 per cent endorsement including:

- freedom of political speech — on the process and functioning of government;
- trial by jury — a trial by jury should cover everyone as a fundamental right;
- freedom of religion;
- right to vote; and
- freedom from arbitrary arrest.

Further, more than half of those surveyed believed that their rights are *not* well protected against unfair government action.

It is also encouraging to read data that public opinion favours better protection for individual rights. In 1991, 72 per cent of ordinary citizens surveyed wanted a Bill of Rights setting out basic rights and freedoms for individuals.

Perhaps I should add that in contrast 79 per cent of legislators (both Labor and Coalition) believe that human rights are well protected against unfair government action. To paraphrase a famous quote: 'They would think that, wouldn't they?'

The Tampa asylum seekers incident, September 11 and Afghanistan have added complexity to the issue. Australians who believe in basic human rights are also concerned about their security.

The clash of cultures that these incidents have highlighted reveals important tensions within Australian society, and between ideas of protecting freedoms and protecting security. No one disputes the right to protect our borders. But its coupling with the asylum seekers issue has now spawned the 'privative clause'. Historically, Executive actions, without frequent judicial review, have been an explosive cocktail.

## **The way forward**

So, where do we go from here?

One possible safeguard would be to legislate for our own Australian Citizens' Charter, in the same way most Australian corporations, even banks, have done with 'Customers' Rights'.

It simply makes good business sense.

There is a real political opportunity here for Australians to be re-empowered by these rights. As a result people will have less to fear from an increasingly interventionist Executive arm of Government, whatever its political lineage.

I am suggesting that these rights would provide an opportunity for government to re-engage with the Australian people in a tangible way. The Magna Carta established operating procedures for King John and his nobility. This gave them a degree of certainty in their relations and boosted their economy. It might be useful to provide Australians with a similar boost in the development of new 'social capital'.

I am also reminded of Lord Scarman's remarks concerning 'rights' in Britain:

If you are going to protect people who will never have political power, at any rate in the foreseeable future — not only individuals but minority groups — if they are going to be protected, it won't be done in Parliament — they will never muster a majority. It's got to be done by the courts and the courts can only do it if they've got proper guidelines (Scarman 1948: 177).

So to sum up, I believe an Australian Citizens' Charter would firstly assist people by replacing some of the institutional protections that previously existed, but have now disappeared. This may then encourage them to react more pro-actively to the global changes that are engulfing us all.

Secondly, if that was not a strong enough reason prior to September 11, then the proposed curtailing of personal freedoms explicit in the Government's 'war on

terrorism' makes it essential.

And thirdly, I believe we must assemble the maximum degree of public support possible; modern democratic governments of all political persuasions are totally 'focus-group' driven. This is now the 'sine qua non' of any public campaign, no matter how overwhelming the logic.

So, what kind of Charter should we develop? In my view it must not be too ambitious. It should be limited to basic freedoms (freedom from arbitrary arrest or detention, right to a fair trial or due process, the freedom of association, equality of all persons before the law), and statutory not constitutional. It must reflect Australian values and traditions.

However, before this can happen — we need to have a national debate. We need a discussion on what rights to protect and how it should be done.

It is in forums such as this that the fire for the cause must be re-ignited; but we must also ensure the general community is engaged to the maximum extent possible. And, dare I say it, learning from the Republican debate: our efforts must be concentrated on acceptance of a simple minimalist model, with the realisation that division amongst our ranks spells certain disaster.

And finally to stiffen our resolve, let us not be intimidated by the magnitude of the challenge facing us; Benjamin Franklin said it all in 1788 when the proponents of the new American Constitution genuinely feared for its success due to the number and prestige of those opposed: 'popular Opposition to a public Measure is no Proof of its Impropriety, even tho' the Opposition be excited & headed by Men of Distinction'.

What is needed now is a sufficient groundswell of public opinion to encourage the Australian Parliament to establish those guidelines, or Citizens' Charter, for the courts to interpret. In a democracy like Australia's, with its Westminster traditions, and the chequered history of this subject, it is probably the only model likely to achieve success.

For the last word on this subject I can do no better than John Stuart Mill: 'The worth of a State, in the long run, is the worth of the individuals composing it' (Mill 1991: 128). I say it's high time we started helping all Australian individuals with a few 'RIGHTS'. ●

---

## References

### *Australian cases*

*Ex parte McKay* (1907) 2 CAR 1

*Mabo v Queensland (No. 2)* (1992) 175 CLR 1

*Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273

### *Australian legislation*

Migration Act 1958 (Cth)

### *Canadian legislation*

Charter of Rights and Freedoms 1982

### *New Zealand legislation*

Bill of Rights Act 1990

### *UK legislation*

Human Rights Act 1998

### *International legal materials*

International Covenant on Economic, Social and Cultural Rights, 19 December 1966,  
6 ILM 360

### *Books and articles*

Galligan B 'Political culture and institutional design' in P Alston (ed) *Towards an Australian Bill of Rights* Centre for International and Public Law, Canberra 1994 pp 55-72

Mill J S *On Liberty and Other Essays* Oxford University Press, Great Britain 1991

Sandall R *The Culture Cult* Westview Press, United States 2001

Scarman 'Britain and the protection of human rights' (1948) *New Zealand Law Journal* 175

