

# **A BILL OF RIGHTS**

## **An end to our solitude**

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*Where after all do universal rights begin? In small places, close to home... Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world. – Eleanor Roosevelt, UN Delegate*

Australia is now the only Western country without some form of a national bill of rights. Is this significant? Both opponents and supporters of change seem to accept that it is. Critics of proposals for an Australian bill of rights argue that the absence of a bill of rights is proof of our political maturity, that Australia's political system is 'gold plated' and 'second to none' and that such an initiative is unnecessary, indeed foolhardy and antithetical to our democracy. Supporters of a bill of rights express concern that Australia is becoming isolated from the development of human rights in comparable legal systems and point to gaps in Australian law that allow for breaches of international human rights standards.

I want to challenge the claim that Australian democracy has been splendidly effective in protecting human rights since Federation by tracing the way that ideas about rights have been discussed over the last century. I will argue that there is a striking continuity in Australian approaches to rights from the time of Federation until today: our founding fathers were just as fearful as modern politicians about the potential of guaranteed rights to reduce government power. The way ahead is to design a new system for the protection of human rights in Australia.

### **Rights in the Australian Constitution**

Many Australians would be surprised that the Constitution, the fundamental text of Australian public life, contains little about the relationship of governments to the people. The Constitution was in essence a contract first between a new country and its imperial parent and second between the former Australian colonies and a new federal government. Its focus is on the relationships between these old and new institutions. It seems much more concerned about preserving the freedom of interstate trade than with creating the conditions for Australia's inhabitants to live a rewarding life. Overall, our Constitution reads rather drably, overlaid with an anxiety about the preservation of a balance of power between the states and the Commonwealth that's expressed in quite mechanical terms.

The Constitution contains three explicit references to the rights of people, but their language is hedged and technical. Section 80 sets out a citizen's right to a jury trial within the state where an offence took place, when charged on indictment for an offence under Commonwealth law; section 116 denies the Commonwealth Parliament (but not the state parliaments) the power to establish a religion, impose any religious observance, prohibit the free exercise of any religion, or require a religious test as a qualification of public office. Section 117 protects residents of one state from discrimination by another state on the basis of residence. The Constitution says nothing at all about our rights to freedom of expression, to privacy, to health to education or indeed any of the basic conditions of a life worth living.

### **The influence of the US Model**

The overall silence about rights is surprising from a historical perspective. We know that the drafters of the Australian Constitution were very interested in the United States Constitution and were influenced by it in many respects. The US Constitution was the only example of a federal

constitution in existence when talks of federation had begun in Australia in the 1840s, and by the time discussion of federation became serious it was over a hundred years old.

The American model appealed particularly to the Australian imagination because it sat nicely with the terms upon which the Australian colonies were prepared to federate. Many aspects of the Australian Constitution were derived from the American, for example, the provisions relating to the senate and those establishing the Commonwealth judicial system. The Australian scheme of allocation of legislative powers between federal and state governments was also influenced by the American Constitution. The US Constitution contains a long catalogue of rights in the Bill of Rights, inserted in the Constitution in 1789, and expanded in later amendments. Indeed, most Americans identify their Constitution entirely with its statement of rights. Why, then, does our Constitution contain only fleeting, minimal references to rights?

The explanation traditionally offered is historical. The years of turmoil in the United States preceding the drafting and adoption of the American Bill of Rights (and later constitutional amendments protecting individual liberties) are given as the reason for the presence of those guarantees. Because the Australian transition to federation was peaceful, so the argument goes, there was no need for constitutional entrenchments of individual rights.

The absence of a catalogue of rights in the Australian Constitution is also regularly explained as a consequence of the institution of responsible government – the convention that the executive branch of government is kept in check by being answerable to the elected legislature. Sir Owen Dixon, perhaps the most influential Chief Justice of the Australian High Court explained to an American audience in 1942 that a study of the US Constitution ‘fired no Australian constitutional drafter with enthusiasm for the principle of guarantees of rights’. He went on:

*Why, asked the Australian democrats, should doubt be thrown on the wisdom and safety of entrusting to the chosen representatives of the people...all legislative power, substantially without fetter or restriction?*

### **Utilitarianism in Australian public life**

The absence of rights guarantees reflects the dominance of the ideology of utilitarianism in Australian public life. Utilitarianism views the aim of political society as the achievement of the greatest happiness of the greatest number: a utilitarian would thus be anxious to ensure that the majority’s will, however expressed, prevailed at all times and would design constitutional systems to achieve this. Utilitarian philosophers typically reject the idea of individuals as bearers of rights, because this implies that individual or minority interests may on occasion take precedence over those of the majority.

The debates during the drafting of the Australian Constitution, in two conventions in the 1890s, reflect a utilitarian mood. For example, there are explicit statements of fear during the debates that any references to rights might invalidate colonial legislation that discriminated against non-Europeans and so fail to reflect the will of the majority of the European inhabitants. Anti-Chinese feeling played a role in the process of Australian nation building. The identification of a common enemy was a useful strategy in uniting the colonies’ disparate interests. It was also directly at odds with any notion that all individuals could be said to be ‘naturally’ endowed with rights.

### **Rights and the constitutional convention**

Almost all the initiatives with respect to rights during the drafting of the Australian Constitution were taken by Inglis Clark. Clark was the Tasmanian Attorney-General during much of this time and was a respected and active figure. He prepared a preliminary draft of a constitution in 1890 which deeply influenced the first official draft produced by Queensland premier Samuel Griffith

in 1891. Clark's draft did not reproduce the entire catalogue of rights found in the United States Constitution, but featured just four of them: the right to a jury trial, to the privileges and immunities of state citizenship, to equal protection under the law and due process, and to freedom of an non-establishment of religion.

Clark's bold inclusion of some rights in his draft constitution met with considerable resistance from his fellow drafters. Some ultimately survived in the form that we find them today. For example, Clark's proposal of a right to a jury trial for all indictable offences under Commonwealth law was whittled back to give the federal government considerable discretion to be able to avoid a jury trial through using a summary procedure, rather than an indictment. In particular, Clark's attempts to insert the language of equal protection of the law and due process as part of a privileges and immunities clause based on the US Constitution were an abject failure.

Certain contradictory themes recur in the debates about Clark's proposals. The immediate concern was that the provision was couched in general and uncertain language. This criticism was typically followed by the objection that the provision would have too certain an impact, because they could have the effect of invalidating colonial legislation, particularly that which discriminated against non-European workers.

Behind these arguments was an interest in preserving the greatest possible sphere of state autonomy. Robert Garran's *The Coming Commonwealth*, published in 1987, foreshadowed the course of the debate in the conventions. He argued that few of the provisions of the US Constitution relating to individual rights were relevant to Australia. They were either trivial or already amply secured. He described the idea of a declaration of rights as 'an interference with state rights, on behalf of popular rights: an interference undoubtedly justifiable, if necessary, but if not necessary, better dispensed with'.

Sire John Forrest, the premier of Western Australia, warned the Melbourne convention in 1898 that an equal protection clause would create particular difficulties with 'coloured' residents of his state. West Australian legislation prevented Asian or African 'aliens' from obtaining mining rights or privileges without provision of the government, and imposed an absolute ban on the employment of Asians and Africans as miners. Forrest feared that, if such aliens were resident in other parts of Australia and not subject to similar restrictions, they would be able to invoke the clause to avoid the West Australian restrictions. He spoke frankly:

*It is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but still it is so. I do not want this clause to pass in such a shape which would undo what is about to be done in most of the colonies...in regard to that class of persons. It seems to me that should the clause be passed in its present shape, if a person, whatever his nationality, his colour or his character may be, happens to live in one state, another state could not legislate in any way to prohibit his entrance into that state.*

Sir Isaac Isaacs, later Chief Justice of the High Court and Governor-General, also warned of the dangers of the language of equal protection and the possibility that a clause could invalidate state factory legislation that restricted the employment of Asian workers.

The Australian rejection of the American system of rights guarantees was based above all on a concern to preserve the autonomy of the states. Consent to federation, it was argued, should not have implications for the way that a state dealt with anyone within its jurisdiction. This view was supported by what now appear to be contradictory arguments: the constantly expressed confidence

that the states were unlikely to abridge any individual freedoms, and consensus that the power to enact racially discriminatory legislation was part of the inherent sovereignty of the states.

Early on in our constitutional history, therefore, the notion of state's rights was closely linked with the right to discriminate against racial minorities.

### **Analysing the past**

How critical should we be of the drafters of the Australian Constitution for the very narrow approach they took to the idea of rights, particularly their concern to allow racial discrimination? In other contexts, such as the debate over the stolen generations of Aboriginal children, there have been many who argue that it is inappropriate to judge the past using modern standards of morality. The current Chief Justice of the High Court, Murray Gleeson, has cautioned against slipping into an assumption of moral superiority when considering the values of the Constitution's drafters.

However, it is worth remembering that the Australian concerns in the 1880s and 1890s to preserve a white society met with some contemporary resistance. The British were particularly concerned about immigration policies based explicitly on colour. This concern was partly driven by their desire to maintain good political and commercial relations with China and partly by a sense it was inappropriate to distinguish between subjects of the British Empire on the basis of race. The candid acknowledgement by the constitutional drafters of their desire to preserve discriminatory state legislation was not, then, a mere reflection of current social mores.

I think that there are two main reasons to subject the constitutional drafters' motives to scrutiny today. The first is that in many ways these motives have deeply affected later discussions about rights. There have been remarkably unswerving themes in the debates over the last century: the most consistent has been the claim that the introduction of guarantees of rights would undermine our federal system by impinging on states' rights. For example, in the national debate in 2000 over whether the mandatory sentencing laws of Western Australia and the Northern Territory were a breach of human rights, a constant argument from all sides of politics was that the Commonwealth Government should not intervene to overturn state and territory legislation. Prime Minister John Howard, for example, said that such action, while theoretically possible, would 'knock the federal system out of balance'.

The deployment of the rhetoric of states' rights in the debates over human rights in Australia has some resonance with the historiography of the United States Civil War. Although contemporary documents indicate that both the North and the South regarded the institution of slavery as the cause of the war, Confederate politicians and some historians later denied that slavery was central to the conflict. They argued that instead the war was fought over the issue of the states' right to secede from the Union; in essence, it was about the North's attack on the South's constitutional rights. This 'Lost Cause' interpretation of the civil war still remains powerful today, allowing the South to view its defeat as a noble pursuit of liberty. The Australian tradition of invoking the notion of states' rights as a counterpoint to human rights shares this revisionist quality, masking the reality of racism.

A second reason why it is important to remember the complex tangle of original objections to the inclusion of protections for rights in our Constitution arises when analysing more modern debates about reform of the Constitution. There is a tendency in Australia to attribute extraordinary foresight and wisdom to the constitutional drafters and to argue that it is inappropriate to tinker with the brilliance of their architecture. Investigating the ideas and motives of the constitutional drafters a hundred years on provides a counterweight to the assumption of constitutional perfection, or at least constitutional sufficiency.

If the reasons for particular silences and gaps in the Constitution can be shown to be neither heroic nor admirable to today's standards, the sanctity of the constitutional text is eroded and debate about its future becomes possible. An understanding of the motives of the constitutional founding fathers allows us to peel away excessive nostalgia about their wisdom.

### **The interpretation of Constitutional Rights**

What impact have the three surviving references to rights in the Constitution had in Australian jurisprudence? Overall, the restricted language in the rights provisions has been further eroded by their interpretation in litigation before the Australian High Court.

The section 80 right to a jury trial for Commonwealth offences charged on indictment has been whittled away by decisions that there were no restraints on the Commonwealth's government's discretion to make an offence triable summarily or on indictment. The High Court pointed out in the case of *Cheng vs The Queen* in 2000 that section 80 does not give a right to trial by jury for all serious offences, but simply for offences deemed indictable. This effectively gives the Commonwealth complete power to determine when a jury trial is held. The Commonwealth produced evidence of the intentions of the founding fathers to establish that section 80 was an insubstantial guarantee.

In dissent, Justice Michael Kirby provided an alternative view of section 80 that would give it considerably more force. He criticised the 'sterile' and 'withered' formalist view of the section approved by the majority of the High Court:

*The framers of the Constitution did not intend, nor did they enjoy the powers to require, that their subjective expectations, wishes or hopes should control all succeeding generations of Australians who live under the protection of the Constitution...The consideration that governs the meaning of the constitutional text is the ascertainment, with the eyes of the present generation, of the essential characteristics of the text read as a constitutional charter of government. We are not chained to the expectations of 1900.*

But for now this view is very much a minority view.

The section 116 prohibition on federal laws establishing or restricting the free exercise of religion has had a very limited impact compared to its American ancestor: for example, the High court has held that, while the Commonwealth cannot impose a national religion, it may assist the practice of religion by providing financial assistance to religious schools. Section 117's convoluted protection from discriminatory state legislative or executive action has been interpreted very narrowly to offer a minimalist protection.

At various stages, the High Court has attempted to enlarge the protection of rights through identifying implied rights in the Constitution. For example, in 1992 the High Court acknowledged that the Constitution requires some degree of political communication. The right has been much debated, and later decisions of the High Court have arguably limited its scope. Other High Court decisions have sketched rights to legal equality, equality of voting power and some form of freedom of association. But these implied rights do not have a firm status in our constitutional fabric, and the changing membership of the High Court makes them vulnerable to reinterpretation and indeed evaporation.

### **International human rights in Australia**

What other moves have been made since Federation for the protection of human rights in Australia? Australia has been affected by the international development of a human rights system, starting with the international adoption of the United Nations Charter in 1945. With Dr

HV Evatt as Foreign Minister, Australia played a significant role in the drafting of the Universal Declaration of Human Rights in 1948. But within successive Australian delegations to conferences drafting the two central human rights treaties – the International Covenant on civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights – there was considerable concern about the possible implications of the drafted rights for Australia’s restrictive immigration policies and for the position of Australia’s indigenous peoples.

Australia was very slow to ratify the major human rights treaties: it took us ten years to ratify the Convention on the Elimination of Racial Discrimination of 1965 and 14 years to ratify the ICCPR. But by now we are a party to most of the major international human rights treaties, including the three central covenants: the Convention against Torture, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women.

Do these international commitments provide a de facto Australian system of rights protection, compensating for the silences in our Constitution and reducing our self-imposed solitude? In our legal system, international treaties can have direct effect in Australian law only if they are specifically incorporated by legislation. And, by and large, we have been very reluctant to legislate to implement our international human rights commitments.

In 1973, Attorney-General Lionel Murphy introduced a human rights Bill into the Australian Parliament as a precursor to constitutional change. The draft legislation was heavily based on the ICCPR and sought to bind both federal and state governments. The bill drew a storm of protest, much of it based on the claim that the law would diminish states’ rights, and it eventually lapsed. A second legislative attempt to enact a bill of rights was made in 1983 by Attorney-General Gareth Evans: this was a much watered-down version of the Murphy Bill, providing only for judicial interpretation favouring constructions of laws that promoted human rights. Again, a heated attack on the proposals was made because the law would diminish state legislative power and, in the end, the draft law was not introduced into parliament. In 1985, Lionel Bowen – back in the Attorney-Generalship – introduced yet another version of an Australian bill of rights into parliament. The draft legislation was narrower still than the Evans Bill. It applied only to federal laws and excluded all state laws from its scope. Despite its modest form, the Bill attracted such intense controversy and opposition from politicians from all political parties that it was allowed to lapse. In 1988, a modest proposal to extend the existing rights provisions in the Constitution to the Australian states was decisively defeated at referendum.

Australia argues that it has implemented the ICCPR through the *Human Rights and Equal Opportunity Commission (HREOC) Act 1986*. Although the ICCPR is appended to the HREOC legislation, most of the rights it contains cannot be directly enforced in Australia. HREOC only has the power to advise the government on any violations of the rights – advice that governments have ignored far more often than not.

We have done better with respect to our international treaty commitments specifically on race and sex discrimination, with the enactment of the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984*. However, significant gaps in implementation remain. For example, the Sex Discrimination Act has built into it many exemptions that compromise our commitment to non-discrimination on the basis of sex, including exemptions with respect to equal pay, maternity leave, private clubs, religions and the armed forces. At the other end of the spectrum, in the case of the Convention on the Rights of the Child, Australia has taken no steps at all to implement its treaty obligations. We have left implementation entirely up to the discretion of the states, and allowed clear violations of the treaty, such as mandatory sentencing laws, to go uncurbed.

I should note that Australia has accepted the right of individuals to make complaints to three of the human rights treaty bodies, once all domestic remedies have been exhausted.

In each of the three cases that have wound their way completely through the United Nations system, Australia has been found to be in breach of its treaty obligations. The Commonwealth Government's response to these outcomes has been to attack the human rights committees. In a series of press releases in 2000, the government accused the committees of taking too much account of the complaints of non-government organisations and not accepting the views of the Australian Government. When the UN voiced criticism of the mandatory sentencing laws in 2000, Mr Howard was reported as saying that Australia would make its own moral judgements and would not be told what to do by outsiders. He went on to say, 'I'm not going to cop this country's human rights name being tarnished in the context of a domestic political argument'.

It seems, then, that somehow recourse to international human rights standards triggers an isolationist streak in the Australian psyche. Australia is not remarkable in this: we see the same tendency also in many powerful global players such as China and the United States.

### **Australian solitude with respect to rights**

The reasons for Australia's solitude with respect to rights are complex. One is certainly the strength of the rather perverted notion of states' rights. Another is the sense that we can rely on a democratically elected legislature to 'do the right thing' and adequately protect our human rights. The idea is that we should trust our politicians to be on the alert for human rights abuses and to remedy them.

This hostility to the idea of placing some restraints on governmental action to protect human rights is shared also by prominent Labor politicians. For example, former New South Wales premier Bob Carr consistently attacked the idea of a bill of rights as abdicating the proper role of parliament to the courts.

Faith that elected parliaments will always be vigilant on human rights issues is not borne out in practice. Indeed, often the major political parties are in agreement on the groups whose freedoms need to be restricted. Our legal history is littered with laws that discriminated against particular groups: the legal framework that allowed Aboriginal children to be taken from their families, the laws that made homosexuality a criminal offence, and immigration laws that restricted entry for particular races. More recently, Australian legislatures have enacted laws that allow mandatory sentencing of children, laws that discriminate against applicants for refugee status on the basis of race, and laws that allow indefinite detention of asylum seekers.

The case of *Al-Kateb*, decided by the High Court in 2004, illustrates the broad power of the Commonwealth Government to breach human rights. Mr Ahmed Ali Al-Kateb was born in Kuwait in 1976 to Palestinian parents. He arrived by boat in Australia in December 2000 claiming refugee status and was placed in detention. There was no dispute that he was a stateless person because Kuwait did not consider him a citizen and Palestine did not have the capacity to grant citizenship. Mr Al-Kateb applied for, but was refused, a protection visa to stay in Australia. After failed legal challenges to this decision, he wrote to the Minister for Immigration in 2002 asking to be sent back either to Kuwait or Gaza. No country would accept him, however. The Migration Act states that a non-citizen unlawfully in Australia who asks to be removed from Australia must be removed 'as soon as reasonably practicable'. It also requires the continued detention of such a person until he or she is removed. The High Court had to determine whether or not, under the Migration Act, the Minister for Immigration could detain an individual in Al-Kateb's situation until another country was prepared to accept him. Members of the High Court conceded that the likelihood of Mr Al-Kateb's acceptance by another country was remote in the circumstances and that his detention in Australia would be indefinite, but a majority of the court held that the Migration Act validly allowed Mr Al-Kateb's detention. In the words of Justice McHugh, the outcome for Mr Al-Kateb was 'tragic', but there was no reason why parliament

could not legislate for indefinite detention. The facts in *Al-Kateb* clearly involve breaches of human rights: indefinite detention because of bureaucratic failures cannot be justified. The type of constitutional analysis favoured by the High Court majority, however, illustrates the difficulties of the Australian legal system in responding to these human rights concerns.

The utilitarianism that has lain at the heart of Australian political life since Federation impoverishes Australian democracy. The very essence of human rights is to protect vulnerable minority groups from always being subject to the will of majorities: the idea is that are some rights that are so basic to human dignity that they should be taken out of the political arena and given special protection. So a true democracy cannot rest entirely on majority rule and must allow minority groups to freely exercise certain rights.

### **Models for Bills of Rights**

Thus far, I have detailed my diagnosis of Australia's century of human rights solitude. What is the way ahead in this new century? I think that the development of an Australian charter of rights would defuse the suspicion that human rights are somehow a foreign import and that they undermine Australian sovereignty. It would allow human rights issues to be debated and decided here at home with a full appreciation of the historical and cultural context. Ironically, however, it seems that the greatest critics of the international human rights system also provide the greatest resistance to the development of an Australian human rights system.

The term 'bill of rights' can cover many different models of rights protection. One such model is a constitutional bill of rights. This would require a referendum to amend the Constitution, a difficult task given the high failure rate of referendum proposals in Australia. It would, however, preclude legislative action that breached human rights. One example of such a constitutional bill of rights is the Canadian Charter of Rights and Freedoms of 1982. That charter sets out various categories of rights drawn from national and international sources: fundamental freedoms (including freedom of conscience, religion, thought, expression and association); democratic rights (including the right to vote, the minimum duration of legislatures and their minimum annual meeting times), legal rights (including procedural rights in criminal matters and the right to an interpreter in all proceedings), official language rights and the educational rights of minority language groups. The charter also affirms existing aboriginal and treaty rights of the Indian, Inuit and Metis populations.

The charter rights are enforceable by the courts, which can grant remedies for infringement of rights as they consider appropriate and just. Because of the charter's constitutional status, any law inconsistent with the charter has no force or effect.

Section 1 of the charter qualifies the rights and freedoms by making them subject 'to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. Section 33, which was inserted at the last minute as the price of the provinces' agreement to the charter, allows any Canadian legislature to exclude legislation from most of the charter's operations by express declaration for (renewable) five year periods.

There are, of course, mixed views on the charter. It has brought a raft of major social and political issues before the Canadian Supreme Court. For example, the right to equality in section 15 of the charter has been broadly interpreted as a substantive right and not just a right to equal treatment: it prevents discrimination against groups traditionally subject to stereotyping, disadvantage and social prejudice. Not surprisingly, the court's decisions have regularly provoked controversy. The criticism has come from all sides: some argue that the court is not overtly political: other criticise its failure to advance real social justice in Canada. The Canadian example reminds us that it would be unwise to imagine that a set of constitutionally entrenched rights alone can deliver

social justice. At best, it can be one toll among many social, economic and political influences contributing to social justice.

A second model for a national system of rights protection is offered by the South African Constitution, adopted in 1996. The Constitution was drafted over two years by the newly elected multi-racial parliament, and it involved extensive public consultation. It included a bill of rights whose provision may be restricted (as in the Canadian charter) only by limitations that are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The South African bill of rights applies to all law and to all the organs of the state. It is striking for its broad coverage of rights: it includes the standard civil and political rights as well as economic and social rights such as the right to access to housing, health care, food, water and security. It also includes property rights and the right to a healthy environment. The SA Constitutional Court has not interpreted the economic and social rights contained in the bill of rights as requiring the government to take reasonable measures to protect them.

Constitutional bills of rights are not the only possible method to improve the protection of human rights in Australia. Both New Zealand (in 1990) and the United Kingdom (in 1998) have adopted statutory bills of rights – catalogues of rights that are enforced through requiring legislation to be read as far as possible as consistent with them. The United Kingdom's Human Rights Act 1998 also provides a cause of action to require public authorities (including private bodies exercising public functions) to comply with human rights. These statutory bills of rights can be amended by parliament to retain a significant role in the human rights debate: courts cannot invalidate legislation that is incompatible with human rights standards. When faced with a law it considers to be in breach of human rights, a court can instead make a formal statement to this effect, which puts pressure on parliament to amend the legislation. It has been said that this type of mechanism established a dialogue among courts, parliament and the executive about protection of human rights, rather than leaving the issue up to judicial interpretation.

## Conclusion

In the Al-Kateb case, described above, Justice McHugh argued that the lack of an Australian Bill of Rights justified his narrow reading of the Migration Act. He implied that an Australian bill would authorise the judiciary to look beyond Australia's borders and take international human rights law into account in interpreting domestic law. While the current High court has been particularly reluctant to take human rights seriously, there is little doubt that some form of bill of rights can affect the development of law. The United Kingdom's Human Rights Act, for example, has changed the approach of its courts to issues of human rights. The decision of the House of Lords in *A (FC) v Secretary of State for the Home Department* – a challenge to Part 4 of the *Terrorism Act 2000*, which provided a much harsher regime for non-British nationals suspected of being engaged in terrorist activities than for British nationals in the same position – illustrates the impact of the Human Rights Act. In contrast to the Australian High Court's bland acceptance of the government's indefinite detention of failed asylum seekers, the House of Lords described the indefinite detention of suspected terrorists who were foreign nationals as 'the antithesis of the right to liberty and security of the person'. Baroness Hale of Richmond said:

*It is not for the executive to decide who should be locked up for any length of time, let alone indefinitely. Only the courts can do that and, except as a preliminary step before trial, only after the grounds for detaining someone have been proved. Executive detention is the antithesis of the right to liberty and security of the person.*

The fact that Australia is now the only Western country without some form of bill of rights is not in itself an argument for change, but the fact that it is not even on the national political agenda indicates how far we still have to go. It is striking that our constitutional parent, the United

Kingdom, has now renounced faith in the parliamentary process as a perfect protector of human rights, a faith to which our politicians still so keenly cling.

In this new century we need to shake off our isolation and be more active in thinking about the protection of rights in our legal and constitutional order. There are some intriguing signs of change. The Australian Capital Territory recently adopted the first bill of rights in Australia, the *Human Rights Act 2004*, which builds on the statutory models developed in the New Zealand and the United Kingdom. And in April 2005, the Victorian Government established a committee to develop proposals for a similar statutory bill of rights, which delivered its final report to the Attorney-General in November. Given the strength of the states' rights objections to an Australian bill of rights over the last century, there is some irony in the fact that the Australian states are now leading the Commonwealth in this area.