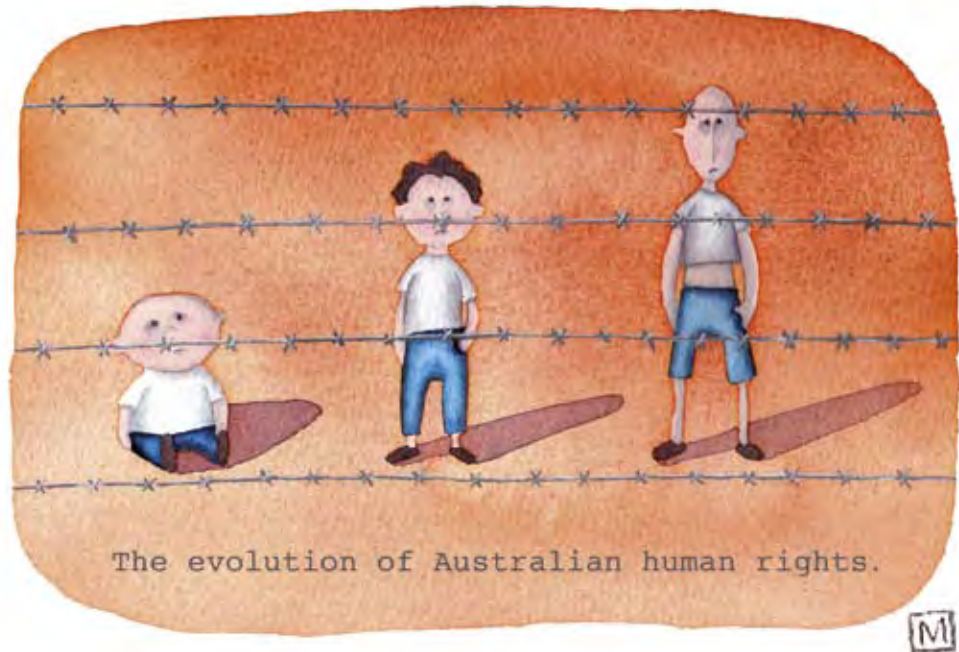


Human rights: neither new nor radical but necessary

By Susan Ryan AO (BA '63)



It's a strange debate. Those who attack the proposed human rights act because of a possible role for "unelected" judges are sometimes themselves "unelected" judges. Opposition to protection of religious freedom comes from Christian lobbyists. Included among the few but noisy voices complaining that the USA with its constitutional bill of rights amounts to a terrifying negative example is Australia's best known US history and politics enthusiast.

How did we get to this strange place?

It started for me in 2005. In 2004 the High Court decided that Al Kateb, a detainee who could not officially establish his place of birth, could be kept in detention indefinitely, without trial, without a conviction and without any other civil or political rights. The community was becoming aware that, in accordance with the deliberate policy of the government of the day, small children were imprisoned for long periods behind barbed wire in remote Australian detention centres. This cruel set

up made children ill, as it did their parents and other detainees. The detainees had done no wrong. They had come here on small, dangerous boats, desperate for assistance but without regular documents. Citizens began to agitate, to demand that Australia, long since a signatory to the major UN human rights instruments, should honour our responsibilities. Appeals went to the High Court.

In the absence of a national law, Australia's international human rights obligations commitments meant nothing. It was clear to many that Australia's lack of a human rights act was a serious gap in our national laws. Our campaign group proposed embodying our existing UN covenant commitments in a national law. This approach was neither new nor radical. With the Racial Discrimination Act (1975) and the Sex Discrimination Act (1984) parliament had put several UN rights commitments into Australian statutes.

It was time to do the same with civil and political rights, economic and social rights, and the rights of refugees and children.

We proposed not a constitutional bill but an ordinary act of parliament, made by the parliament to be changed only by the parliament. The courts could decide whether other laws and policies of the Commonwealth were consistent with it. Where the court found inconsistency, the parliament would note this and respond, as it saw fit. The courts could not strike down the law, or change it.

All laws, before introduction into parliament, would be checked against the human rights act. Parliament would actively monitor and scrutinise human rights aspects of law and policy. Commonwealth departments and agencies, and external service providers carrying out Commonwealth work, such as immigration detention centre guards, would be bound to respect the legislated rights. Where parliament chose to exempt any activity from coverage, parliament would say so specifically.

Perhaps the most important effect of such a law would be to change how the bureaucracy dealt with vulnerable

Illustration:
Maggie Renvoize

recipients of health, accommodation, income or other public services.

We knew this approach could work, as it had done in the UK since 1998, and more recently in the ACT and Victoria. This was a modest proposal, an effective step towards a fairer society.

At the outset, in 2005, it seemed to me that our lack of a human rights law (and by now only Australia among the world's democracies lacks such a measure) reflected neglect by the parliament, over-reaction to the increased numbers of asylum seekers, and confusion between the need for new anti-terror measures with the equally important need for compassionate and humane treatment of those fleeing wars and oppressive regimes. I expected that with rational debate, and informed consideration of available models, the gap would be closed. Community support, whenever measured, was favourable. Beneficiaries would include not only incarcerated children, but the mentally ill, frail old people, the disabled, and indigenous Australians. Members of minority religions, especially Muslims, were in need of a clear statement of human rights supported by Commonwealth law, to better protect their dignity, their safety, and their access to basic services.

Then a strange vociferous opposition invaded the airwaves and newspapers. Where did it come from? What was it trying to stop? One persistent argument against a law to protect vulnerable people from misuse of state power comes from those who are hostile to judges, on the basis that they are "unelected". Those seized by this emotion keep warning that the enactment of a law requiring judicial consideration of rights would precipitate judges into taking over parliament. Judges, we were warned, instead of politicians would make laws, abolish laws and direct budgets. The absence of evidence for such scaremongering seems only to have rendered the proponents more careless and more lurid in their claims.

But it is strange. Looking at community respect for our independent judiciary, and the open access to parliamentary processes by advocates of particular causes, this anti-judge sentiment seems entirely misplaced.

Objective experts agree that like

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Susan Ryan above

the UK, which enacted its Human Rights Act in 1998, Australia, respecting the separation of powers, could, without legal obstacles, put in place a human rights act. It would be made by parliament, implemented by the bureaucracy and, on rare occasions, allow the courts to consider consistency between this law and other Commonwealth laws.

This is the kind of proposal I am pleased to say has emerged from the national consultation, established by the Rudd government in December 2008. Chaired by Frank Brennan SJ, it was asked to report on what Australians think about human rights protection. The Brennan committee received in excess of 40,000 submissions, an unprecedented response and evidence in itself that the issue is live. More than 87 per cent of those who made their views known favoured a human rights act.

More strangeness: submissions by some Christian lobbyists opposed



THE HUMAN RIGHTS ACT FOR AUSTRALIA CAMPAIGN AT

www.humanrightsact.com.au includes a model human rights act which has been extensively discussed since 2005, and details of the network of more than 70 community organisations, the Australian Human Rights Group.

Details of the Commonwealth Government consultation, all public submissions and the Brennan report is at www.humanrightsconsultation.gov.au

the measure. Unmoved by the needs of the vulnerable, their focus was to maintain above all their right to discriminate in employment in favour of those of their faith. This requirement in most cases, for example teachers in church schools, has long been met in Commonwealth anti-discrimination law. Providing other aspects of human rights are observed, and policies are transparent, these exemptions can be expected to continue. Reassuringly, other religious groups, whose primary concern is the protection of the vulnerable, strongly support a human rights act.

Despite the attacks on judges by some judges, several former High Court, Federal and Supreme Court judges have publicly supported the approach under discussion. And, not so strange, many students of the history and politics of the US regard the US Bill of Rights, different as it is from what we are proposing, as an important historical element of American democracy.

We are now set for action. The consultation has demonstrated the need and support for a new act. A range of possible models is available. The Rudd government has published the report and promised a response before too long. What will follow? It is hard to see why the government would fail to act on the results of the consultation. It is also hard to grasp why the Opposition, at the time of writing, has turned its face against a modest measure to protect the rights of powerless individuals against the state. They may well rethink this position.

Yet beneath this reason and openness, something else, redolent of the unlamented culture wars is lurking. The deeper fears and passions aroused by the idea of the weak getting a fair go seem to ensure that the debate will continue a bit before we achieve in Australia what all other democracies enjoy: a specific law that sets out and protects our basic rights as human beings. **SAM**

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