Human Rights and Institutional Dialogue: Lessons for Australia from Canada and the UK

Associate Director of the Castan Centre, Julie Debeljak, had her PhD thesis accepted in July. Here is the edited abstract of that thesis.

This thesis examines the role of the judiciary in interpreting, refining and enforcing human rights norms within domestic legal systems. It focusses on the current situation in Australia compared with the Canadian and British approaches. The current Australian model of human rights promotion and protection relies heavily on the representative arms of government, the executive and the legislature. Indeed, these have an effective monopoly over human rights in Australia. The exclusion of any significant judicial contribution to the promotion and protection of human rights is based on concerns about democracy: in particular, concerns that empowering the judiciary to review and invalidate executive and legislative action against open-textured human rights guarantees is undemocratic.

The thesis demonstrates that, theoretically, human rights and democracy co-exist in a healthy and beneficial state of tension, and that giving the judiciary *some* role in the interpretation, refinement and enforcement of human rights standards is not undemocratic. The theoretical justification of judicial involvement in the promotion and protection of human rights relies on modern notions of democracy and modern human rights instruments which ensure that all arms of government – the legislature, executive and judiciary – share the responsibility for human rights, which is operationalised through an inter-institutional dialogue about democracy and human rights, a dialogue that no single arm can once and finally determine. Most importantly, judicial perspectives on the contours of human rights and democracy do not necessarily prevail over the representatives' perspectives. The different arms of government have distinct, yet complementary, roles.

The theoretical inter-institutional dialogic model is then assessed in the light of two modern human rights instruments, the entrenched *Canadian Charter of Rights and Freedoms 1982* and the statutory *Human Rights Act 1998* (UK). Both models exemplify inter-institutional dialogic approaches to the promotion and protection of human rights. Both models achieve this through the use of three specific mechanisms – the open-textured nature of the human rights guarantees, the non-absoluteness of the human rights guarantees, and the judicial remedial and representative response mechanisms. This thesis concludes by recommending that Australia adopt a modern human rights instrument which establishes a constructive and educative inter-institutional dialogue about human rights and democracy.

The Anti-terrorism Bill

In April, Castan Centre member, Patrick Emerton, made a submission on behalf of the Centre to the Senate Legal and Constitutional Legislation Committee regarding the ***Anti-terrorism Bill 2004****. This is an edited extract.*

In December 2003, the *Australian Security Intelligence Organisation Act 1979* (Cth) was amended to require an individual against whom a warrant has been issued pursuant to section 34D of that Act to surrender their passport and to make it an offence for such a person to leave Australia during the life of the warrant without the permission of the Director-General of Security. The penalty for contravening these provisions is imprisonment for up to 5 years.

The new Bill introduces two provisions which would have the effect of requiring an individual to surrender their passport, and to not leave Australia, upon the Director-General of Security seeking the Minister's consent to a request for the issues of a warrant under s 34D (an 'ASIO warrant').

Currently, the issuing of an ASIO warrant takes a number of steps: the Director-General of Security must seek the Minister's consent; that request must detail any previous ASIO warrants issued in respect of the same person; the Minister must be satisfied that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence and that other methods would be ineffective. In the case of a request for a detention warrant, the Minister must take account of any previous detention pursuant to an ASIO warrant and that the issue of another warrant must be justified by information that is additional to or materially different from that known to the Director-General at the time of the last of the earlier warrants. If the Minister has consented, the Director-General of Security must then make a request to an issuing authority, and they may issue the warrant only if they are satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.

If the new Bill were passed, it would be possible for the Director-General of Security, acting unilaterally, to compel an individual to surrender any passport in his or her possession or under his or her control, and to prohibit that individual from leaving Australia. This is not a power that should be vested in the head of a covert intelligence agency. It subjects individuals to the risk of arbitrary interference with their right to freedom of movement. Furthermore, it is open to significant abuse, including the issuing by the Director-General of serial requests to the Minister where there is no reasonable basis for supposing that the request will be consented to, or that an issuing authority will issue the warrant requested, simply for the purposes of invoking these provisions.