

A *Human Rights Act* for Australia?

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It is sometimes said of Australia's constitutional system that "if it ain't broke, don't fix it". However, the constitutional "checks and balances" intended to contain the raw exercise of political power are increasingly ineffective. As a result, Australians' fundamental human rights are at risk.

One crucial facet of the problem became apparent following a series of High Court decisions on people seeking asylum. The Court found:

- it was powerless to order the release of children in detention in the face of a clear enactment that made no exception for children;
- powerless to prevent the imposition of the "Pacific Solution" which provided that people (most of whom were found subsequently to be genuine refugees) should be detained for years offshore in oppressive and repressive conditions;
- that it could do nothing but decide that a stateless person could be detained by the executive government indefinitely and, if necessary for life.² Notwithstanding that incarceration for life without charge and without a fair trial trashed almost every one of that person's legal rights, recognised by both international and common law; and that
- no matter how long a person seeking asylum was detained, and no matter how bad the conditions of that detention, incarceration would not be regarded as punitive as long as the purpose of the governing law was non-punitive. This was the ultimate triumph of form over substance.

Executive detention has now become Australia's great human rights fault line.

The new counter-terrorism laws provide that Australians, suspected but not proven to have been involved in terrorism related activity, may be detained for weeks or placed under house arrest for up to a year. No charge or trial is necessary. There are no adequate judicial safeguards – judges issue warrants for detention not in their capacity as judges but in their personal capacity. In other words, they are dragooned by the relevant legislation into the service of the executive government.

The relevant judicial proceedings are one sided:

- people who are detained are only provided with a *summary* of the evidence on which the relevant suspicion is based;
- a hearing may be conducted in secret;
- communication between lawyer and client must be monitored by the Australian Federal Police; and
- lawyers will require government issued security clearances.

A judge need only be satisfied of the reasonableness of a suspicion on the balance of probabilities, not on the criminal standard – beyond reasonable doubt. The whole idea of fair trial in this context has been eroded. With the courts increasingly sidelined, parliamentary scrutiny and review should ensure that repressive measures will not become law.

The need for such a commonwealth *Human Rights Act* to protect our fundamental rights and freedoms is more acute now than at any time since this country went through an eerily similar "war on communism" more than 50 years ago. The recent misuse of judges and marginalisation of the courts adds even more weight to the case for the enactment of such an Act.

Australia is the only country in the Western World (and the Westminster world) not to have a constitutional or statutory charter of rights. On the other hand, Canada, New Zealand, the UK and Ireland have all embraced this approach. In doing so they follow the UN's Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

How would a *Human Rights Act* assist in the scrutiny of Sedition or Anti-Terror Laws?

The sedition or anti-terror legislation would have to be considered in the light of, and subject to, the rights and freedoms contained in a commonwealth *Human Rights Act*.

For example, sedition laws would need to be drafted in a manner that is consistent with a freedom of speech and expression. The anti-terror laws would need to be drafted in a manner that is consistent with the right of a person to be free from arbitrary arrest and detention and in a manner that is consistent with the individual's right to receive a fair trial.

An equally important element is the different forms of assessment and evaluation through which controversial legislation would need to pass.

A *Human Rights Act* would act as a "set of navigation lights"³ which would illuminate the critical issues and tensions surrounding the introduction of controversial, human rights related legislation.

It would make the executive, the Parliament, the judiciary and the people more effectively informed about the appropriate balance needed between the protection of fundamental human rights on the one hand and, for example, national security on the other.

(1) <http://www.humanrightsact.com.au/>.

(2) *Al-Kateb v Godwin* [2004] HCA 37.

(3) Former High Court justice Michael McHugh.