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A Charter of Rights for Australia

Julian Burnside

There is one measure which, if adopted in Australia, would make an important difference to this flawed democracy of ours: it is a Charter of Rights.

The response to the idea of a Charter of Rights is not easily summarised. To paraphrase H.W. Fowler, the attitude of Australians about a Bill of Rights may be divided into those who neither know nor care, those who do not know but care very much, those who know and condemn, those who know and approve, and those who know and discriminate.

First, a note about terminology. It makes no difference whether you refer to a Bill of Rights, a Charter of Rights or a Human Rights Act. There is no magic in the name of the thing. At present, a view is emerging that the best name is probably a Human Rights Act, because those who do not have the time or the inclination to give it much thought will not be distracted by the discomforting echoes of the US Bill of Rights or the alien sound of a Charter of Rights. I will talk about a Charter of Rights, because at least it avoids confusion with the US Bill of Rights. However, I think that, on balance, it may be better to argue for a Human Rights Act. The content would be the same, but it may minimise confusion in the public mind.

At the 2020 Summit in Canberra earlier this year, a view emerged strongly that Australia should have a Federal Bill of Rights. That call — fairly predictable in the circumstances —

triggered a series of public speeches and papers as various important figures raised their voices against a Bill of Rights.

These pre-emptive strikes against the possibility of a Federal Bill of Rights had one thing in common: they did not identify what sort of Bill of Rights they are opposed to.

Some of their criticisms would be valid if the proposal was for a US-style Bill of Rights. So far as I am aware, no-one in Australia is arguing for a US-style Bill of Rights. If the opponents of a Bill of Rights think they are shooting fish in a barrel — as the startling self-confidence of some of their comments suggested — then they have the wrong barrel, and the wrong fish.

The US Bill of Rights is an 18th century document with its roots in 17th century England, and a dash of Magna Carta providing the best bits.

Modern Bills of Rights do not concern themselves with the right to bear arms[1] or the quartering of soldiers,[2] or with search warrants.[3] The rights protected by a modern Bill of Rights are — broadly speaking — the sort of rights addressed in the Universal Declaration of Human Rights that Australia adopted in 1948. They are concerned with matters like equality before the law; the right to life; protection from torture and cruel, inhuman or degrading treatment; freedom from forced work; freedom of movement, privacy and reputation; freedom of thought, conscience, religion and belief; freedom of expression; peaceful assembly and freedom of association; protection of families and children; humane treatment when deprived of liberty, and so on.

It would be difficult to find any serious disagreement about the nature of those rights, and difficult to find anyone who rationally opposed them as desirable elements in a civilised society. The disagreement arises on two questions: whether the law should protect those rights, and if so, what is the right means of protecting them.

Some people prefer to speak of a Charter of Rights in order to make it plain that they are not talking about a US-style Bill of Rights. Nevertheless, as noted above, there is no magic in the name. What really matters is the content.

Starting with the fact that we are not advocating a US-style Bill of Rights, it is then necessary to consider what model is being advocated. Broadly speaking, a modern Charter of Rights can be an ordinary statute or constitutionally entrenched, and it can be a weak model or a strong one. The arguments for and against a Charter of Rights change profoundly according to the model under discussion. Unfortunately, those who are against a Charter of Rights never identify exactly what it is they are against.

A statutory Charter of Rights can be disregarded or repealed if the Parliament so wishes. A constitutional Charter of Rights, on the other hand, cannot be repealed or altered except by referendum. A statute expresses the will of the people indirectly through their elected representatives and can be made, changed and repealed by the Parliament. A Constitution, by contrast, expresses the will of the people directly, and can only be changed by the people. As a result, a statutory Charter of Rights, such as Victoria[4] and ACT[5] have, can be changed or repealed by the Parliament if the Parliament so chooses.

So far as I am aware, no-one is seriously arguing for a Constitutional Charter of Rights in Australia. Quite apart from any other consideration, it would be politically impossible. More modest constitutional reforms have been beyond our collective political will, so a constitutional Charter of Rights is really not going to happen for a generation at least. But statutory Charters of Rights serve a useful purpose, and they are not as alarming to politicians.

A strong model Charter, typically, will be couched in language that forbids Parliament to do certain things. So, it will say 'Parliament must not make a law that does X, Y, or Z'. A strong model Charter, typically, will also create rights of action: if a person's rights are breached, they may be able to sue for damages.

By contrast, a weak model simply requires Parliament to take protected rights into account when passing legislation. If they wish to disregard those rights, they must say so plainly. This means that the Parliament will be politically accountable

if it decides to disregard rights that it has previously resolved to respect. In addition, it guides judges in the way they should interpret legislation, so as to preserve rights rather than defeat them. A weak model Charter does not create a free-standing action for damages if a person's human rights are breached.

The ACT and Victoria both have statutory, weak Charters of Rights. So long as the public and the conservative commentators find it alarming to protect rights, a weak statutory model is a good solution.

It is usual to see a range of arguments put up against adoption of a Charter of Rights. The standard ones are as follows:

- Human rights cannot be created: they derive from moral truths.
- Our rights are adequately protected by the majesty of the Common Law.
- It is anti-democratic because it would transfer human power from Parliament to unelected, unrepresentative judges.
- It transfers power disproportionately to minorities.
- They do not work.
- A Charter of Rights will be a lawyers' feast.

Let me deal with each of these in turn.

Moral rights or moral truth

An interesting, but uncommon, argument is that human rights cannot be created by a parliamentary act: they derive from moral truth. Moral truth is a product of natural law. Aristotle is said to be the father of natural law. If that is true, then Thomas Aquinas was its tutor. It provided the bedrock of the Common Law in England, it informed the writing of Hobbes and Locke, and it is reflected in the preamble to the US Declaration of Independence, written by Thomas Jefferson:

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent

> respect to the opinions of mankind requires that they should declare the causes which impel them to the separation … We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness … That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed … That whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles and organising its powers in such form, as to them shall seem most likely to effect their safety and happiness.

Jefferson's reference to 'unalienable rights' is an unmistakable invocation of Natural Law.

Sophocles' play *Antigone* turns on a conflict between natural law and legal positivism. Polynices has been slain. King Creon has ordered that Polynices' body remain on the hillside where the dogs and vultures will devour it. Any person who removes the body to bury it will be put to death by stoning. Antigone is Polynices' sister. She proposes to bury his body, and captures simply the central moral point: 'He is still my brother'.

Her sister, Ismene, while sympathetic, fears to do what she knows is right. The argument is captured in the following lines:

> ANTIGONE: Be what you will; but I will bury him: well for me to die in doing that.
>
> I shall rest, a one loved with him I loved, sinless in my crime; for I owe a longer allegiance to the dead than to the living: in that world I dwell for ever.
>
> But if you will, be guilty of dishonouring laws which the gods have established in honour.
>
> ISMENE: I do them no dishonour; but to defy the State, I have no strength for that.

> ANTIGONE: Such be your plea: I will go to heap the earth above the brother whom I love.

We can sympathise with Antigone's instinct, and with Ismene's weakness.

This being Greek tragedy, Antigone's crime is discovered, and she is taken before King Creon. Creon charges that she has broken the law he made, but she calls on Natural Law:

> ANTIGONE: Yes; for it was not Zeus who made that edict; not such are the laws set among men by the justice who dwells with the gods below; nor deemed I that your decrees were of such force, that a mortal could override the unwritten and unfailing statutes of heaven.
>
> Not through dread of any human pride could I answer to the gods for breaking these. Die I must, I knew that well (how should I not?) even without your edicts. But if I am to die before my time, I count that a gain: for when anyone lives, as I do, compassed about with evils, can there be anything but gain in death?
>
> So for me to meet this doom is trifling grief; but if I had suffered my mother's son to lie in death an unburied corpse, that would have grieved me; for this, I am not grieved.
>
> And if my present deeds are foolish in your sight, it may be that a foolish judge arraigns my folly.

Today, Antigone would be convicted. An appeal to Natural Law does not work. Legal positivism has displaced Natural Law. Subject to constitutional constraints, Laws made by Parliament are valid even if they offend our deepest human instincts. That is the consequence of the constitutional struggles of the 17th century that established the supremacy of Parliament, coupled with the unsympathetic clarity of a written Constitution.

A right that is not recognised by law is nothing but a pious hope. If rights are to be any use at all, they must be recognised in law.

Those who would attach their hopes to Natural Law simply do not know how the law works in a constitutional

democracy. It is a lamentable truth that in Australian courts an appeal to human rights is legally irrelevant, except in Victoria and the ACT.

Our rights are protected

Within the scope of its legislative competence, Parliament's power is unlimited. The classic example of this is that, if Parliament has power to make laws with respect to children, it could validly pass a law that required all blue-eyed babies to be killed at birth. The law, although terrible, would be valid. One response to this is that a democratic system allows that government to be thrown out at the next election. This is not much comfort for the blue-eyed babies born in the meantime. And even this democratic corrective may not be enough: if blue-eyed people are an unpopular minority, the majority may prefer to return the government to power. The Nuremberg laws of Germany in the 1930s were horrifying, but were constitutionally valid laws that attracted the support of many Germans.

Generally, Parliament's powers are defined by reference to subject matter. Within a head of power, Parliament can do pretty much what it likes. Thus, the Commonwealth's power to make laws with respect to immigration has in fact been interpreted by the High Court as justifying a law that permits an innocent person to be held in immigration detention for life, where (incidentally) he is liable for the daily cost of his own detention.

The question then is this. Should we have some mechanism that prevents parliaments from making laws that are unjust, or that offend basic values, even if those laws are otherwise within the scope of Parliament's powers? If such a mechanism is thought useful, it is likely to be called a Charter of Rights, or Bill of Rights, or something similar.

In November 2003 two cases were heard together by the High Court of Australia. Together they tested key aspects of the system of mandatory detention. One was the case of Mr al-Kateb.[6] He arrived in Australia as a boat person and sought asylum. He was placed in immigration detention because the Migration Act says that a non-citizen who does not have a visa

must be detained and must remain in detention until (a) they are given a visa or (b) they are removed from Australia. He was refused a visa. He could not bear it in Woomera and asked to be removed, rather than wait out another year or two by appealing. But it was not possible to remove him from Australia, because he is stateless: there is nowhere to remove him to. The Government's argument was that, although Mr al Kateb has committed no offence and was not a danger to anyone, he could be kept in detention for the rest of his life. On 6 August 2004, the High Court by a majority of 4 to 3 accepted that argument.

The other case, heard alongside al Kateb and decided on the same day, was *Behrooz*.[7] Mr Behrooz came from Iran. He sought asylum and found himself in the endless loop of rejection and appeal and had spent about 14 months before escaping in November 2001. At that time, Woomera was carrying three times as many people as it was designed to carry. The conditions there were abominable. Reports from that time show that there were three working toilets for the population of nearly 1500 people; women having their period had to make a written application for sanitary napkins. And if they needed more than one packet, they had to write and explain why they needed more than one packet and very often they had to go and provide the form to a male nurse who would then dispense what they needed. Conditions in Woomera at that time were unconscionably dreadful. The Immigration Detention Advisory Group, the Government's own appointed body, described Woomera as 'a human tragedy of unknowable proportions'.

Mr Behrooz found it so intolerable that he escaped, along with six others. He managed to get to the nearest rail-head seven kilometres away, where he waited in the shade until he was recaptured. He was charged with escaping from immigration detention. The defence was that, because of the Constitutional doctrine of the Separation of Powers, to hold an innocent person in appalling conditions was unconstitutional.

The Australian Constitution recognises the three powers of government (legislative, executive and judicial) and

allocates them to the three arms of government. The legislative power of government is vested in the Parliament (Chapter I); the executive power is vested in the Executive (Chapter II) and the judicial power is vested in the courts (Chapter III).

The separation of powers doctrine dictates that one arm of government cannot exercise the powers given to another arm of government. This separation and division of powers is designed to provide checks and balances on the exercise of power. It is one of the very few constitutional safeguards we have in Australia. Central to the judicial power is the power to punish. As a matter of constitutional theory, punishment cannot be administered directly by the Parliament or by the Executive: punishment can only be imposed by order of the Chapter III courts. Normally, locking people up is regarded as punishment and therefore it is only Chapter III courts that can lock people up. What about immigration detention?

In *Lim's* case[8] in 1992, the High Court held that administrative detention may be justified in limited circumstances, principally where detention is reasonably necessary as an aid to the performance of a legitimate executive function. So, if a person's asylum claim is to be processed, or if the person is to be made available for removal from Australia then, as long as the detention is reasonably necessary for those purposes, it will be lawful even though not imposed by a Chapter III court.

The defence in *Behrooz* went like this. Assuming mandatory detention is constitutionally valid, if the conditions of detention go beyond anything that could be seen as reasonably necessary to the executive function it supports, then that form of detention would be constitutionally invalid because it amounts to punishment inflicted by the Executive. If conditions in Woomera were harsher than could validly have been imposed by statute, then whatever he escaped from it was not immigration detention, because that mode of detention could not have been validly imposed.

Subpoenas were issued on behalf of Mr Behrooz, directed to the Department and ACM,[9] seeking documents that would reveal details of conditions in detention. They resisted. They said the subpoenas were invalid because the conditions in detention will

never affect the constitutional validity of detention. And all the way to the High Court they maintained this argument that no matter how inhumane the conditions are, detention in those conditions is nevertheless constitutionally valid.

On 6 August, 2004, the High Court accepted the argument.

In October the same year, the High Court held that the same principles apply even if the detainee is a child.[10] It was quite a trifecta: it is constitutionally valid in Australia to take an innocent person and hold her in detention for her entire life, in the worst conditions human malevolence can devise.

These three cases from 2004 are a clear illustration of the problem that, if Parliament decides to make a law that destroys basic rights, the Common Law is unable to prevent that result.

Anti-democratic, because it transfers power to judges

In one sense, it is true that a Charter of Rights gives some power to judges. A Charter of Rights imposes weak limits on the power of Parliament, but not by reference to subject matter. A modern Charter of Rights introduces, or records, a set of basic values that should be observed by Parliament when making laws on matters over which it has legislative power. It sets the baseline of human rights standards on which society has agreed. Because this is so, it is wrong to say that a Charter of Rights abdicates democratic power in favour of unelected judges. Judges simply apply the law passed by the Parliament. That is their role. Many cases raise questions about Parliament's powers. Judges are the umpires who decide whether Parliament has gone beyond the bounds of its power: that is the constitutional role of the courts. A Charter of Rights is a democratically created document, like other statutes. Enforcing it is not undemocratic at all.

Furthermore, a weak statutory Charter of Rights does not significantly constrain Parliament. If Parliament wants to pass a law that undermines a recognised right, it can do so: but it must make it plain that it intends to do so. At that point, it would have to face the political price of recognising certain rights as basic to life in a democratic society, but then removing these rights in a way that it acknowledges is unreasonable.

A weak statutory Charter of Rights does not diminish the power of the Parliament, and it does not transfer any part of Parliament's power to judges.

Protecting unpopular minorities

One of the most surprising objections to a Charter of Rights is that it gives disproportionate power to minority groups. At one level, the complaint is accurate. In Australia today, the people whose human rights are at risk are not members of the comfortable majority, but members of minority groups who are typically powerless and often unpopular and almost always politically irrelevant. Although, in terms, a Charter of Rights protects the rights of all, its primary use is to protect the rights of the weak, because the strong are already safe. The criticism is all the more surprising when you consider that many of those who advance it proclaim themselves to be devout Christians. I had thought, although I haven't checked recently, that much of Christ's teaching was concerned with the protection of the weak, the unpopular, the despised and the oppressed. It seems a curious thing then that practising Christians should object to a law that achieves that result.

This complaint has a darker side. Broadly speaking, Australians have a fairly respectful attitude to human rights. If most Australians were asked what they thought of human rights they would say that human rights matter. The question then arises: How is it that those same people watched with unconcern as David Hicks languished for years in Guantanamo Bay without charge and without trial? How is it that they watched with unconcern for years as innocent men, women and children were locked up indefinitely in desert jails merely because they were fleeing the Taliban or Saddam Hussein? How is it that we have managed such enduring complacency to the plight of the Aborigines whose land was taken and whose children were stolen? How is it that we are so indifferent to the draconian effects of the anti-terror laws as they are applied to Muslims in the Australian community, when we would not tolerate similar intrusions on our own rights?

The answer I think is this: Australians seem to divide human beings into two categories: Us and Other. We think, perhaps subconsciously, my rights matter, and so do those of my family and friends and neighbours, but the human rights of others do not matter in quite the same way because (without saying it) the others are not human in quite the same way we are. It is dangerous thinking and profoundly wrong.

We have human rights not because we are nice or because we are white or because we are Christian, but because we are human. That's the sticking point. That's the bit we don't get. It's the thinking that makes it possible for people to acknowledge that human rights matter and yet resist the possibility of those rights being protected by law.

The blunt fact is this: if rights are not recognised by law, they are not protected. And if we depend for our rights on the assumption that we will always form part of the popular majority, we have learned nothing from history or philosophy.

They do not work

One of the favourite backhanders to dismiss a Charter of Rights is that they don't work. After all, the argument goes, the USSR had an excellent Charter of Rights, and so does Zimbabwe, but look what has happened in those countries. They have a point, of course, but it is not a point about a Charter of Rights: it is a point about the rule of law. No Constitution, no Charter of Rights, no statute, no other document can protect rights unless the rule of law is strong. If the political opposition is weak or absent, if the media are cowed or complacent, if the courts are not fearlessly independent, the promises contained on bits of paper will achieve nothing. That is not our problem in Australia. Our judges are competent, hard-working and independent of the other arms of government. While I have disagreed with many judgments in Australian courts, I have never doubted the honesty or integrity of our judges. The same is not true of the USSR or Zimbabwe.

Guantanamo Bay provides both a challenge to, and a demonstration of, this point. President George W. Bush chose Guantanamo Bay in Cuba as a place of detention specifically to

avoid the reach of American law and the principle of legality; he chose it in order to place detainees beyond the protection of the Constitution and the Bill of Rights. Hypocrisy, as La Rochefoucauld said, is a tribute that vice pays to virtue.

He failed. In case after case, the US Supreme Court has held that the protection of the Constitution reaches Guantanamo. By trying to avoid the reach of the Constitution and the rule of law, President Bush acknowledged the power of those ideas.

Although it has taken a long time to expose the fraud and cruelty of Guantanamo, the fact that Bush chose Guantanamo, rather than some place on American soil, is mute testament to the power of a Bill of Rights and the rule of law. Bush chose Guantanamo in order to side-step the decent protections offered by American law. The Supreme Court has gradually dismantled that plan. Most recently, in the *Boumediene* case,[11] the Supreme Court struck down that part of the Military Commissions Act that purported to deny Guantanamo detainees the right to seek habeas corpus. Habeas corpus is the legal equivalent of a canary in the coal mine: when governments interfere with the right to challenge the lawfulness of a person's detention, you can be sure that all is not well.

So long as the rule of law remains intact, a Charter of Rights provides effective protection of the basic standards that form the bedrock of our society: standards that should be so obvious that they go without saying — until they are betrayed.

Lawyers' feast

The 'lawyers' feast' argument is a popular one. It is my favourite, because the trick it depends on is so beguiling. It works this way: lawyers are awful people; feasts are very nice; a nice thing happening to a nasty person is no good; if a Charter of Rights will be good for lawyers, it must be a bad thing.

The lawyers' geast argument is a coded way of saying that lawyers want a Charter of Rights because it will generate lucrative work for them. The argument is false, and for two reasons. First, in Australia today the people who need a Charter of

Rights — the people whose rights are denied or disregarded – are almost always at the margins of society. They cannot afford to pay lawyers. Most human rights work in Australia today is done for no fee. Some is funded so that the lawyers receive some payment, usually a very small percentage of their ordinary rates. If that's a lawyer's feast, it will be a fairly wretched affair. No-one does human rights work to get rich, because human rights work does not make you rich.

Second, because a weak statutory Charter of Rights does not provide a free-standing right of action for damages where a person's human rights have been breached. Generally, cases in which a Charter of Rights has a role to play will be cases that would have been brought in any event: but the existence of a Charter may fortify the arguments. The al Kateb case was heard despite there being no Federal Charter of Rights to call on; but the existence of a Charter of Rights would have changed the result.

A Charter of Rights will not be a lawyers' feast: it will simply make it possible to secure just results, where presently the law creates injustice.

Conclusion

Mr Howard was uncharacteristically honest when he was asked, at a doorstop interview, what he thought of the idea of a Charter of Rights. The ACT Parliament had just passed its Human Rights Act (2004). Mr Howard said that he thought a Bill of Rights was a very bad idea, because it 'interferes with the way governments do things'. That is precisely the point. A couple of months later, Mr Howard won the al Kateb case and the Behrooz case. A Charter of Rights would have interfered with his wish to jail an innocent man for life; it may have derailed his argument that locking children in unimaginably harsh conditions is OK.

In a single sentence he demonstrated how much of a difference it would make in Australian society if politicians could be punished for dishonesty, and if we had some basic protection for human rights.

Endnotes

1 US Bill of Rights, 2nd Amendment.
2 US Bill of Rights, 3rd Amendment.
3 US Bill of Rights, 4th Amendment.
4 The Charter of Human Rights and Responsibilities Act 2006.
5 Human Rights Act 2004.
6 *Al-Kateb v Godwin* (2004) 219 CLR 562.
7 *Behrooz v Secretary of the Department of Immigration* (2004) 219 CLR 486.
8 *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1.
9 Australasian Correctional Management, the private prison operators who then ran detention centres on contract to the Commonwealth government.
10 Re *Woolley* (2004) 225 CLR 1.
11 *Boumediene et al. v. Bush, President of the United States, et al.* Argued 5 Dec, 2007 — Decided 12 June, 2008.

Julian Burnside is an Australian barrister specialising in commercial litigation. He is actively involved in human rights work, in particular in relation to refugees and the arts. He is President of Liberty Victoria and Chair of fortyfivedownstairs and the Mietta Foundation. He is the author of *Matilda and the Dragon, From Nothing to Zero, Wordwatching — Field Notes from an Amateur Philologist* and *Watching Brief: Reflections on Human Rights, Law, and Justice.*