



Insight - Opinion

**A charter for Australia's modern needs**

Michael Kirby - Justice Michael Kirby is a High Court judge. This is an edited extract from a speech at the Law Institute of Victoria on Thursday

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Diversity poses challenges that did not exist when the constitution was written.

NO SYSTEM of law and government is perfect. Australia's is a whole lot better than most - above all, our institutions are largely uncorrupted. We must all endeavour to keep them so and we need always to be on the lookout for defects in our institutions and ways in which we can make them respond more effectively to contemporary challenges. That is what the charter of rights debate is all about. Not perfection. But improvement and enhanced transparency in our government institutions.

Critics say that there is no need for us to change our institutions and adopt a charter of rights. The strongest voices with this view tend to come from politicians and sections of the media. It is natural that those who enjoy unbridled power generally resist any attempt to impose bridles. Why would they welcome checks or restrictions beyond those that they are presently saddled with?

There is a lot of theory in our democratic government. But when it is analysed, the actual role of the people, in rendering politicians accountable to them, is pretty passive. Basically, it comes down to a visit to a church hall once every three years or so. Of course, citizens can join political parties. But fewer and fewer now do. They can watch the television and telephone talk-back radio. But most do not. Most watch passively the game of politicians and the media.

The only proposal for a charter of rights that is presently on the table in Australia is one, like that of Victoria and the Australian Capital Territory, based on the statutory model accepted in Britain in the Human Rights Act 1998. That model does not give courts a power to override or invalidate a law made by Parliament. It simply encourages courts to interpret laws made by Parliament, in so far as they can, to be consistent with the charter. If an inconsistency exists, this is brought to the attention of Parliament. It still has the final say.

As a constitutional process, such a charter seems to enhance the operation of the elected legislature. It seems to improve responsiveness to concerns about injustice, inequality and departure from fundamental rights. It is ironic that the media is generally a strong supporter of freedom of information laws on the basis that they enhance transparency of the government process and thus democratic accountability yet most appear to oppose a charter. Enhanced transparency in civic discussion and decision-making about basic rights is what I take the present charter model to offer.

A country, such as Australia, which has seen serious injustices contrary to fundamental human rights - to women, to Aborigines, to Asian people, to homosexuals, to religious minorities - can hardly say that there is no need for democratic lawmakers to have an occasional stimulus based on fundamental principles of human equality and basic rights. Anything that is likely to stimulate the democratic process to such ends would seem, on the face of things, to be a step in the right direction so far as the quality of our governance is concerned.

A common criticism is that a bill of rights will not protect the people from the wrongs of unjust laws. The shocking abuses in the Soviet Union and in countries such as Zimbabwe are often mentioned. All this is fair criticism. Laws are written on paper. More is needed than fine flowing prose.

On the other hand, Australia is not really in the same category as such abusers of fundamental rights. Our need is not protection against the grossest oppressions. A statement of basic rights, constantly before Parliament and citizens, could encourage legislation that is respectful of the fundamental human dignity of all citizens. Would that be such a bad thing?

The Australian constitution contains a few fundamental rights (such as to jury trial in federal offences and protection from compulsory federal acquisition of property without payment of just terms). But it is true that the founders rejected a bill of rights after the American model. However, that was done in a highly monochrome society 98% of whom were Anglo-Celts. The challenges for lawmaking in Australia today derive from what is, at once, the large challenge and great opportunity of life in Australia: its racial, religious and cultural diversity. It is when a society becomes so diverse that there may be a need to collect and state the basic values we hold in common. Such principles then become part of a nation's narrative. They become the source of the idea that helps to forge a shared identity and, indeed, links with human beings everywhere.

Human rights are not new to Australia. They are deeply enshrined in common law principles given effect by the judges. But such principles can all too easily be overridden, including thoughtlessly, by the legislature. The charter model affords an opportunity to bring Parliament's attention to serious departures from fundamentals.

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