

**Charter of rights will make polities more accountable**

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1 - All-round Country

34

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FREEDOM of speech is cherished by Australians and championed by the media. However, the right to free speech, like most other human rights, does not appear in the Australian Constitution and the High Court has only recognised a narrow implied freedom of political speech.

Rights most of us take for granted are not recognised in Australia and governments increasingly ignore them.

Many western democracies have legislation protecting fundamental rights. After extensive community consultation and support, Victoria and the ACT now have statutory charters of rights. Inquiries in both Tasmania and Western Australia have recommended similar legislation.

The previous NSW attorney-general, Bob Debus, now a federal minister, called for community consultation over a charter of rights for NSW.

In The Australian last Friday, the current NSW Attorney-General, John Hatzistergos, questioned the need for a charter of rights. Much of what he had to say I dispute.

It is abundantly clear that human rights are not adequately protected under the common law or by ad hoc pieces of legislation introduced over the years to deal with discrimination and privacy.

Despite the requirement of international law to do so, international instruments Australia ratified decades ago have not been introduced into Australian law. Reading rights into the Constitution, which the Mason High Court tried to do, is not fashionable and is open to criticism.

Hatzistergos argues that our political structure has served us well since Federation. As the founding fathers didn't recommend a bill of rights, he contends that change is unnecessary. Yet, these are the same men who did not think that Aborigines should be counted as members of the Australian population. These are the same men who were determined to ensure that governments could discriminate against "coloured aliens".

Like the attorney-general, Robert Menzies said that "to live in a common law country is the very best guarantee of the rights of the individual".

However, as the retired High Court justice Michael McHugh QC has explained, the common law does not provide protection for a comprehensive range of human rights and the limited protection it does offer is patchy.

There is a presumption in the common law that legislation does not invade common law rights. Still, there are countless examples where, for reasons of political expediency or administrative convenience, governments have removed or overridden them. There is also a presumption that new laws will not work retrospectively.

But if the government wants to, it can make an act illegal that was formerly legal. A charter of rights would, at least, inhibit the introduction of such laws.

In the early 1990s when it last considered the question, the NSW Bar Association, the governing body of NSW barristers, opposed the enactment of a bill of rights. This month it supported it. So, what has changed?

There can be no doubt that legislation introduced at both a state and federal level over the past decade has profoundly affected attitudes towards a charter of rights. The association now believes it is time to introduce legislation that defines fundamental human rights. This is not about increasing work for lawyers or empowering judges to make social change, as the naysayers argue. It is about making politicians accountable, if they choose to meddle with our basic rights.

The Attorney-General is wrong when he says that Australians have rejected bills of rights "in all the successive referendums" after Federation. The question has never been put.

Further, his argument confuses a US-style constitutional bill of rights with the current proposal for a statutory charter of rights that may be repealed or amended by the parliament without the need for a referendum. Whatever attitude people may have to constitutionally entrenched bills of rights tells us nothing about their views about a statutory charter.

In any case, community views have changed since 1900. People are concerned about government legislation that violates human rights, from control orders over the movement of people who have not committed offences to laws that facilitate detention without charge.

This week we hear that the NSW Government is considering making permanent the emergency police powers granted for the purpose of the APEC summit. Last year the NSW Government legislated to remove the sunset clause on the emergency powers that were introduced after the Cronulla riots.

Those laws provide police with broad powers to close off streets, to stop and search people and cars and to seize and detain property without a warrant.

Surely we want our governments to demonstrate the overriding need to remove fundamental rights before they are given the power to do so. A statutory charter would require this.

Australia's position is at odds with the position of other western democracies.

The Attorney-General's argument that rights protection is often the product of revolution or civil war ignores 50 years of international debate on the subject. Canada, New Zealand and Britain were intent on protecting human rights, the violation of which had led to civil war or revolution elsewhere.

Australia has never opened itself up to independent scrutiny of its human rights in the way that even Russia and Turkey now have.

Hatzistergos also cites countries like the former Soviet Union and Pakistan to show that even constitutional protection for human rights does not prevent major human rights abuses. However, the mere fact that some people or governments break laws has never been a good reason for saying that those laws are either unnecessary or undesirable.

Modern charters of rights respect the role of the parliament to make the law and that of the judiciary to adjudicate upon it. The most salutary effect of a human rights charter is that whenever a government tries to interfere with our basic rights, it must publicly explain why that is necessary.

A charter of rights may make governments think twice before they take away our rights. A charter of rights will make governments more accountable to the electorate. Who could sensibly argue against that?

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