

Features

**Lessons from UK human rights act: the good, bad and the ugly**

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Australia can learn from their experience, says James Welch

THE Rudd Government, in its first budget, committed \$2.8 million to a national public consultation regarding the protection of human rights, including whether Australia should enact a charter of rights.

With the British Human Rights Act now in its eighth year, I would like to suggest some lessons that Australia might draw from the British experience. Inevitably, the latter leads one to focus on the more negative aspects of our experience, so I want to start with the good stuff before dwelling at greater length on the problems that you might want to avoid.

The act has led to improved scrutiny of deaths in custody and to changes in the release of mandatory life prisoners -- decisions on release are now made by judges and not politicians.

Asylum seekers have successfully challenged changes to benefits laws that would have left them destitute.

Laws have been introduced to allow transgendered people to have their ``new'' gender legally recognised and to allow gay men and lesbians to marry in all but name (the latter was not in response to a specific HRA case, but I have no doubt that the decision to introduce the legislation was made in part to pre-empt HRA challenges).

Our courts are now developing a law of privacy, seeking to achieve a balance between an individual's rights and freedom of expression of the press.

More broadly, matters that would not previously have been justifiable can now be brought before the courts.

We have a new language to articulate rights.

The high point for me and my colleagues at Liberty was the House of Lords' ruling in December 2004 in *A & Ors v Secretary of State for the Home Department*.

The government had derogated from Article 5 of the European Convention on Human Rights (the right to liberty) in order that parliament could pass a law to permit the indefinite detention of non-nationals suspected of international terrorism.

The House of Lords struck the derogation down as too broad, and declared the legislation incompatible with the convention. In the face of the Lords' condemnation, the government did not seek to renew the legislation. This is an example of the constitutional balance in the HRA working well.

To preserve parliamentary sovereignty, the HRA did not give the courts the power to strike down primary legislation; all the courts can do is make declarations of incompatibility.

The courts have used the power sparingly and government and parliament have acted or are acting on all such declarations. The niceties of constitutional theory are being observed.

Moreover, a scheme that does not depend on the blunt instrument of a strike-down allows incompatibilities to be remedied in a considered fashion.

Now I come to three things that have not worked so well.

First, there is the issue of which bodies are directly bound by the HRA.

The HRA imposes an obligation on public authorities to act compatibly with the convention, but does not define what a public authority is save, crucially, to say that a body will be a public authority if it is performing "functions of a public nature".

The courts have taken a very restrictive approach to this issue. It came to a head in a case concerning an elderly woman who was placed in a privately run care home by a local authority acting under its statutory duty to provide her with care.

The House of Lords held, by a narrow margin, that the care home was not a public authority and owed the woman no duties under the HRA.

Legislation is now being passed to overturn this ruling.

While this may deal with the problem in relation to care homes, the courts' restrictive approach will doubtless cause problems elsewhere.

A second problem is that the HRA has done little to change the courts' traditional reluctance to trespass in the social policy sphere.

In large part this is due to the European convention itself: it is concerned with civil and political rights, not economic and social ones.

The final issue is one that stems from the relationship of our domestic courts to the European Court of Human Rights in Strasbourg.

The courts are enjoined by Section 2 of the HRA to take account of Strasbourg case law.

When the Bill was before parliament, the hope was expressed by Lord Lester QC that the British courts would be able to give a lead to the Strasbourg court in developing its jurisprudence; Strasbourg's interpretation of the convention would be a floor, not a ceiling.

Sadly, this is not how our courts have looked at it.

Rather, the House of Lords has made it clear that the European Court of Human Rights is the primary body charged with the interpretation of the convention and that the English courts must not overreach it.

Hopes that we might develop a distinct human rights jurisprudence drawing on English common law have been shattered.

Before concluding, I want to take off my lawyer's hat (as an English solicitor I don't get to wear a wig) to consider the HRA's standing more generally. There is visceral hostility to the HRA in some sections of the media.

Attempts by perceived "undesirables" to use the act, however unmeritorious the claim, are reported as if they were successful.

Faced with this barrage of criticism and smarting from some court decisions with which they no doubt genuinely disagree (particularly on terrorism-related issues), ministers in the very government that introduced the HRA have failed to support it and have even in some cases expressed regret at having passed it.

Both main parties are now working on proposals for British bills of rights even though both must realise that any replacement for the HRA could not guarantee lesser rights than under the convention.

It is difficult to know why there is such hostility towards the HRA. It may be that it is seen as a European imposition. More broadly, it may be that the problem lies in way that it was enacted.

We chose to adopt and incorporate an existing human rights instrument as our bill of rights. There was no public dialogue on the content of the rights.

Further, it was pushed through parliament by a triumphant new government, albeit with muted support from the Tories.

Perhaps if there had been full consultation on the content of the HRA and it had been passed with the full engagement of all main political parties, the HRA would be on a much surer footing now.

James Welch is the legal director of Liberty, a civil liberties organisation in Britain.

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