Are human rights the past or the future for Australia?

Mitchell Oration
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I am delighted and honoured to participate at this event in honour of Dame Roma Mitchell, and I'm grateful to Linda Matthews, the South Australian Commissioner for Equal Opportunity for her invitation.

Dame Roma is a truly grand figure on the South Australian and Australian landscape: a jurist of great distinction and a wonderful, wise, warm woman who took great interest in the welfare of others. Dame Roma had none of the pomposity or self-importance of some public figures and an ironic, self-deprecating sense of humour. She was in many ways a very private woman, sometimes taken aback at the willingness of people to reveal too much of themselves; she was also a devout Catholic who drew much comfort from her faith and a keen surfer into her eighties.

You will all know Dame Roma's career highlights: she broke so many barriers for women that she became known as 'Roma the first': the first woman QC in Australia, the first woman to be appointed to a state Supreme Court, the first woman Chancellor of a University and later the first woman Governor of an Australian state.

In 1981 she was asked by the Fraser government to become Chairman of the new Human Rights Commission (HRC), the precursor to the Human Rights and Equal Opportunity Commission. This appointment allowed Dame Roma's long standing concern with social justice to gain a wider, public platform.

There is a much-told story about her appointment to the HRC, which demonstrates her quick wit. Apparently, before the offer of the position of Chairman was made, Senator Durack's office was concerned about Dame Roma's age and whether it prevented her from being appointed to the statutory position. A telegram was sent by the Attorney-General's office to Roma Mitchell's office referring to the arrangements for the position and in conclusion asking 'How old Roma Mitchell?" A telegram was sent by return saying simply 'Old Roma very fine thank you.'

Unfortunately, I cannot claim to know Dame Roma well personally, but our brief meetings made a large impression on me. The first time I met her was as a rather overawed law student. I had been detailed to present flowers to the wives of visiting judges and the sole woman judge at a judicial conference. I had to knock on their hotel room doors and present bouquets. Some were cool, some were warm, some were confused and one thought I was seeking a tip!

When I got to Dame Roma's door, she invited me in, sat me down, asked who I was and what I did and then asked about my plans. I told her that I hoped to give up the law entirely and become an anthropologist. She said briskly: 'Well, that's a pity: We'll never change anything unless more women get involved.'

A particular, admirable quality of Dame Roma was her willingness to change her ideas. She was astonishingly successful in many completely male-dominated worlds and sometimes women in this position say that they have never encountered any form of discrimination and are unsympathetic to the idea that there should be legislation to protect women against discrimination or to promote affirmative action. Dame Roma once said in an interview:

"I always thought that if you quietly infiltrated the system then gradually women would just be there and discrimination would go away. It became clear to me that this quiet method … was not going to be very effective. You can't just let things go along. You've got to do it by affirmative action". She concluded "When people go on against affirmative action it usually takes the wind out of their sails when I say "I might have thought that fifteen years ago, but I've moved on".[1]

The theme of my talk today is the place of human rights in Australia; to tie into the theme of the Adelaide Festival of Ideas (Which way to the future?) I'm asking 'Are human rights the past or the future for Australia?'

I chose this theme to honour Dame Roma's involvement in human rights in Australia, although she was such a measured, diplomatic and subtle person, she may not have agreed with all that I have to say.

Let's first consider Australia's past in human rights:

The possibility of including rights in our Constitution was raised before Federation. Inglis Clark's preliminary draft of a constitution in 1890, which influenced the first official draft produced by Queensland Premier Samuel Griffith in 1891, contained a fragmentary bill of rights, drawn from the United State Bill of Rights: the right to a jury trial, to the privileges and immunities of state citizenship, to equal protection under the law and due process and to freedom of and non-establishment of religion.

The inclusion of these rights in Clark's draft constitution met with considerable resistance, and only some references survived the constitutional convention debates in a watered-down form.[2] The language of equal protection of the laws and due process as part of a privileges and immunities clause provoked considerable hostility. One reason

[1] Susan Mitchell, *Matriarchs* (1987) pp36, 43.
[2] E.g. Australian Constitution sections 80 (right to a jury trial for Commonwealth offences tried on indictment), 116 (prohibition on religious restrictions in Commonwealth laws), 117 (prohibition of discrimination by a state against residents of another state).

for this was that such provisions could invalidate colonial mining and factory legislation, particularly that which discriminated against non-European workers.[3]

There was little further attention to issues of rights until the 1970s in the context of attempts to adopt a national bill of rights:

There was a major national debate on this topic in the early 1970s. In 1973 the Attorney-General Lionel Murphy introduced a Human Rights Bill into the Australian parliament as a precursor to constitutional change. The draft legislation was heavily based on the ICCPR and sought to bind both federal and state governments. The Bill drew a storm of protest and it eventually lapsed.

A second legislative attempt to enact a bill of rights was made in 1983 by Attorney-General Gareth Evans: this was a much watered-down version of the Murphy law providing for judicial interpretation to favour constructions of laws that promoted human rights. Again, there was a heated attack on the proposals and in the end the draft law was not introduced into Parliament.

In 1985, Labor Attorney-General, Lionel Bowen, introduced yet another version of an Australian Bill of Rights into Parliament. The draft legislation was narrower still than the Evans Bill. It applied only to federal laws and excluded all state laws from its scope. Despite its modest form, the bill attracted such intense controversy and opposition from politicians from all political parties that it was allowed to lapse.

In 1988 a modest proposal to extend the existing rights provisions in the Constitution to the Australian states was decisively defeated at referendum.[4]

One reason for this disdain for formal protection of rights is the sense that any type of bill of rights would be antithetical to Australian democracy:

The idea is that the notion of parliamentary sovereignty inherited from the United Kingdom and the tradition of responsible government -- the convention that the executive branch of government is kept in check by being answerable to the elected legislature – are adequate to protect individual rights.

For example in 2001 New South Wales Labor Premier Bob Carr strongly attacked proposals for a bill of rights. He said:

> Parliaments are elected to make laws. In doing so, they make judgments about how the rights and interests of the public should be balanced. … [I]f the decision is unacceptable, the community can make its views known at regular elections. This is our political tradition. A bill of rights would pose a fundamental shift in that tradition, with the Parliament abdicating its important policy-making functions to the judiciary. ... A bill of rights is an admission of the failure of

[3] *Melbourne Debates* 1898 at 666.
[4] For details see George Williams, *Human Rights under the Australian Constitution* (1999).

> parliaments, governments and the people to behave in a reasonable, responsible and respectful manner. I do not believe we have failed.[5]

PM Howard has also endorsed 'robust parliamentary debate' as the best protector of human rights.[6] But this rosy view of Australian parliamentary practice has little evidence to support it. Faith that elected Parliaments will always be vigilant on human rights issues is not borne out in practice. Indeed, often the major political parties are in agreement on the groups whose freedoms need to be restricted.

Australian legislatures for example have enacted laws that allow mandatory sentencing of children, laws that effectively discriminate against applicants for refugee status on the basis of race and that allow indefinite detention of asylum seekers.

These examples illustrate some of the problems in our legal system in protecting human rights. Because there are few limits on legislative power in Australia, it is possible for our democratically elected representatives to act to breach human rights without effective scrutiny. Minorities are most at risk of human rights breaches and, for this reason, legislatures are unlikely to be held accountable for human rights violations at the ballot box.

But, by contrast to its domestic record, Australia has been generally a keen participant in international human rights treaties;

Australia is a party to all the major United Nations human rights treaties: the two general treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the treaties dealing with either particular human rights abuses (the Genocide Convention, the Convention on the Elimination of Racial Discrimination, the Convention against Torture) or that protect particular groups (the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child (CROC)). We have signalled that we will ratify the new Convention of the Rights of Persons with Disabilities.

What is striking is that a wealthy country like Australia, with a long democratic tradition, has not managed to implement fully any of our human rights treaty commitments. Take one of the central Covenants: the ICCPR sets out a range of rights, from the right to self-determination, the right to be free from torture, to the right to freedom of speech, to the right of minorities to the preservation of their culture, to the right of privacy and non-discrimination. Under article 2 of the Covenant, Australia has agreed to take the necessary steps to take measures to give effect to the rights recognised in the treaty.

No Australian government has taken this obligation of implementation seriously. The best that we have come up with is the creation of Dame Roma's HRC and its successor,

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[5] Bob Carr, 'Only people -- not bills -- protect rights', *The Australian*, 9 January 2001, p 17.

[6] See also, E.g. James Allan, 'All bets are off when a bill of rights comes in' *Sydney Morning Herald*, 18 April 2006.

HREOC. Although the ICCPR is appended to the HREOC legislation, its rights cannot be directly enforced. HREOC only has the power to advise the government on any violations of the rights, advice which governments have ignored far more often than not.

We have done better with respect to our international treaty commitments specifically on race and sex discrimination, with the enactment of the Racial Discrimination Act and the Sex Discrimination Act (SDA). However, significant gaps in implementation remain.

For example, the UN Committee on the Elimination of Racial Discrimination has stated that Australia's native title regime is inconsistent with our obligations under international law. And the SDA has built into it many exemptions that compromise our commitment to non-discrimination on the basis of sex (for example with respect to equal pay, maternity leave, private clubs, religions and the armed forces.)

At the other end of the spectrum, in the case of the CROC, Australia has taken no steps at all to implement its treaty obligations. We have left implementation entirely up to the discretion of the states, and allowed clear violations of the treaty to go uncurbed.

The international human rights treaties are mainly used by the government to criticize other countries, while we feel relaxed and comfortable in the knowledge that they are not about us.

So it's fair to say I think that human rights have not been a large part of Australia's past.

I have been struck by references to human rights in the current debate about the Commonwealth intervention in the Northern Territory. Some commentators have indeed blamed a 'rights culture' for the dysfunction of many Indigenous communities.[7]

I find this hard to understand because questions of human rights have had so little impact in Australia's past. It is also hard to understand because the language of children's rights has been prominent in the rhetoric about the intervention, although not yet, as far as it is possible to tell, in the implementation of the plan.

What of the role of human rights in Australia's future? I think that over the next decade, we will see much greater interest in protecting human rights domestically. Very slowly, and sporadically, we are seeing a thawing of the Australian antipathy to domestic protection of human rights.

One element of this has been in the context of anti-terrorism legislation which has been drafted with little concern for human rights. For example, the Commonwealth's 2005 anti-terror law contains a number of mechanisms, such as preventative detention, control orders and broad definitions of seditious behaviour that clearly violate international human rights standards, particularly the right not to be arbitrarily detained, the right to a fair trial and the right to freedom of speech.

[7] Eg 'Indigenous Change a Generational Task' Editorial, *The Weekend Australian* 30 June - 1 July 2007 p 18.

Many groups in Australia were alarmed by the extent of the laws, although they attracted the support of the Opposition. The Law Council of Australia and the HREOC spoke out very strongly against the breaches of human rights involved and some critics argued that the laws would be more acceptable if Australia had a bill of rights to balance their draconian potential.[8]

This move has however been ruled out by the Commonwealth government; however the Opposition has been warily interested, with the Labor National Conference in April this year agreeing to consult on the issue.

Another (perhaps surprising) element of the thaw with respect to human rights has been developments in the states and territories: My home jurisdiction adopted Australia's first bill of rights in 2004, the ACT Human Rights Act (HRA); and Victoria has followed with its Victorian Charter of Rights and Responsibilities. Western Australia is now engaged in a formal consultation about whether to adopt a Charter of Rights and Tasmania's Law Reform Committee is considering the same issue.

These developments are modeled on the UK Human Rights Act 1998 and the New Zealand Bill of Rights 1990, rather than on the more familiar US Bill of Rights.

These 'modern' forms of bills of rights are statutory, rather than constitutional, and can be repealed or amended by the legislature.

The major difference of these laws, compared to the US Bill of Rights, is that they do not allow the judiciary to strike down legislation as invalid if it is inconsistent with human rights. Rather, they depend on what has been described as a 'dialogue' model of human rights protection.

The participants in the dialogue are the three arms of government, and the community. The mechanisms for dialogue are, first of all, a requirement that all laws be interpreted to be consistent with human rights as far as possible.

If a human rights-consistent interpretation is not possible, the laws allow the judiciary to issue a formal declaration that the law is inconsistent with human rights. This does not affect the validity of the law, but requires the legislature to consider the inconsistency and make a judgment how to proceed.

It should be emphasised that the human rights dialogue contemplated by these modern bills of rights is not open-ended – after debate, the legislature is assigned the final word on human rights protection.

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[8] Even some supporters of the laws, such as Queensland Liberal backbencher Steven Ciobo, thought that a bill of rights would be valuable in this context. In a speech in federal Parliament in 2005 he said that a statutory bill of rights could ensure that 'the individual remains the focus of a liberal democracy' at a time when 'the executive must tread more heavily in areas of individual rights'. See Terry Lane's interview with Steven Ciobo on 13 November 2005 available at http://www.abc.net.au/rn/talks/natint/stories/s1502935.htm

Indeed one complaint about these types of bills of rights is that they are too weak by ultimately leaving the protection of human rights to legislative judgment.[9] But, I would argue that their purpose is to create a durable human rights culture within government and the community, rather than a judicial monopoly on the application of human rights.

Their impact should be less in high profile court cases, and more on the operation of government. The effect of a bill of rights should be to require a government to think through the human rights implications of proposed actions.

And this is just what we are seeing in practice: for example, over the last three years in the ACT, the major effect of the HRA has been on the workings of the executive government and the legislature.

A variety of government policy proposals have been redesigned, or jettisoned, on human rights grounds. For example, our new prison is to be built according to the best human rights standards. The ACT's new anti-terrorism laws, designed to complement the 2005 Commonwealth laws, provide many more legal safeguards than those of the Commonwealth or other states and territories.

It may be that, in particular circumstances, a government will decide that it will enact a law that will result in the breach of human rights; but it should only do so when it has fully considered all the issues, and when it has had to justify publicly the human rights breach.

Conclusion

I have made the claim that human rights have only made fleeting appearances in Australia's past; and the optimistic prediction that they will be an increasing part of our future.

I think that the ACT and Victorian experiments in protecting human rights suggest a way round the great Australian myth that parliament is the only proper location for human rights conversations and decisions.

A bill of rights is antithetical to Australian democracy only if we are operating with a very narrow understanding of democracy; that it simply means that the majority rules, unconstrained by protections for minority interests.

I would argue for a richer understanding of democracy that involves acknowledging that there are some rights that are so essential to human dignity that legislatures should be required to think twice before they tamper with them.

[9] The Victorian Charter however includes a right of action against public authorities for breach of human rights.

A bill of rights would not be, in Bob Carr's phrase, an admission of failure of the legislative process, but rather a safety net to encourage governments to act in ways that may 'elude them under pressure of the moment.'[10]

In this context, a national bill of rights would enhance and support Australian democracy. It is an issue that deserves the broadest discussion and debate, not just by lawyers, but by the whole community.

In celebrating Dame Roma's work and the great contribution she made to our public life, we should draw inspiration from her courage, commitment, honesty and willingness to change her mind, and act, when persuaded by the facts.

She once said that "a Human Rights Commission ought to be fairly controversial. Otherwise people would talk about human rights as though it's a nice comfortable thing and certainly everyone should have them. But when you realise that other people's human rights are going to impinge upon you, they're not nearly as comfortable as you thought they were going to be."[11]

I think that an appropriate tribute to Dame Roma's remarkable life and work would be for there to be a serious debate about developing an Australian bill of rights to ensure that human rights become part of the fabric of our future.

[10] Laurence Tribe, *American Constitutional Law* (1978) p 10.
[11] *Matriarchs* p. 39.