The decline of parliamentary democracy in a post truth era: a Charter of Rights for Australia

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I was especially pleased to be invited to give the annual memorial oration for Jim Carlton as I knew him to be a true liberal and a socially progressive, warm hearted man of great integrity. Elected as the member for Mackellor in Sydney's northern beaches, Jim became Secretary General of the Liberal Party, commanding respect, as Mr Turnbull recognised, as an astute and influential member of the party. I came to know him a little after his retirement from politics when he was appointed the Secretary General of the Australian Red Cross, for which role he was awarded the highest international honour, the Henry Dunant medal.

I have admired Jim's commitment to social justice and the partnership with his wife Dianna. Some years ago, I directed an ADB aid project in Mongolia over a three year period and learnt of the orphanage established in Ulaanbaatar, established and supported by two remarkable Australians. I was delighted to learn that Diana had spent time working with the children at that orphanage. She and Jim were quiet and modest people with compassion and belief in public service. I imagine he would have been proud to know that this lecture series on 'Accountability and Integrity' is in his name.

My topic tonight deals with a decline in Australia's system of parliamentary democracy in this 'post truth' era; an era, where political ideology is drives policy not evidence, where expertise attracts personal attack, and where populism and so called 'retail politics' constrain informed public debate and decision-making. In this era of alterative facts and false news, I am reminded of the words perhaps mistakenly attributed to George Orwell:

"In a Time of Universal Deceit — Telling the Truth Is a Revolutionary Act".

It has been true of course that for as long as recorded history and before, deceit, propaganda, and outright lies, have been the oft-employed tools of those in power.

What, if anything, is different today? Scholars researching the phenomenon of post truth argue that the difference lies in the growing tolerance for subjective views against all the evidence. Certainly, it is true that governments are all too happy to discard expert advice, reviews and inquiries, if to do so meets their ideological and political needs. Evidence of climate change is a primary example, along with side-lining of the Finkel Report; the government ignored the recommendation of the

National Security Legislation Monitor that control orders should be abolished and extended them to 14 year olds; Government's rejection of the lengthy consultative process leading to the Uluru Statement from the Heart.

Personal attacks by government on the bearers of inconvenient truths are common devices, such as the "children overboard" allegations in 200 and accusations against Save the Children. The Dean of the Harvard School of Government asked the question in the year before the last presidential election -Do Facts matter? She concluded, no, not once a personal view has crystalised.

Linked to the readiness to discard the facts is the misleading idea of balance. Balance is not the aim of evidence-based policy. Rather, I suggest it is to get as close to the truth as possible. Late last year Senator Fifield introduced a Bill called the *ABC (Fair and Balanced) Bill 2017*.

"Who could possibly object to fairness and balance"? said Minister Mitch Fifield. The Bill failed to pass, but it raises the question:

Should we give equal time and weight for ignorance?

Interviewers often employ the technique to put an opposing view and asking the interviewee to comment. The consequence of repeating the ill-informed view as a provocative question has quite the opposite effect in giving air time, oxygen and apparent credibility to a false view.

I suggest that the rule of law is at risk where credible facts, evidence and reasoned reports and inquiries and recommendations are ignored in favour of political and short-term solutions that often fail to address the problem. Moreover, in an environment where evidence does not inform laws, it has become more important than ever that Parliament, the traditional bulwark against executive abuse, should meet its role as a check on the inevitable encroachments and overreach by government.

Over the past twenty years or so, the major political parties have agreed with each other to pass laws that threaten some of the most fundamental rights and freedoms we have inherited from our common law tradition. Governments have been remarkably successful in persuading Parliaments to pass laws that are contrary, even explicitly contrary, to common law rights and to the international human rights regime to which Australia is a party.

In short, we should be both alert and alarmed.

I now believe that an effective tool to strengthen the power of the courts, and hopefully parliament itself, to check the abuse of executive powers is to enact a Charter of Rights at the federal level.

My reason for taking up the cudgels for a charter that has been politically inert for many years is that, over the past 20 years or so, Australia has become increasingly isolated from international and comparative judicial thinking—especially from the

'like-minded' nations with which we compare ourselves. Australia is the only common law country and only democracy in the world without a legislated, if not constitutionally entrenched, Charter or Bill of Rights. The consequences of Australia's failure to enact a Charter of Rights are reflected in the seeming powerlessness of the judiciary as a check against unfair laws.

As the former president of the AHRC, I have watched with growing concern as, piece by piece, legislation has been passed by compliant Federal Parliaments over the past 15 years or so, facilitating a creeping expansion of non-compellable and non-reviewable discretions of Ministers. Examples include the executive authority to detain unauthorised asylum seekers for years without charge or trial on the doubtful ground of the administrative need to deport, to hold terrorist suspects for extended periods for questioning, to strip a dual national of citizenship, to use meta data retention laws to diminish privacy and freedom of speech and to pass mandatory sentencing laws that diminish the independence of the courts. The Coalition Government's suspension of the *Racial Discrimination Act 1975* to facilitate the Northern Territory Intervention in 2007 is yet another notable illustration of how executive power can be abused or overreached.

At the state level, we have also seen numerous new laws diminishing our freedoms: the NT's paperless arrest laws, Queensland's "bikie" laws and mandatory sentences, NSW's laws against 'annoying behaviour' during the Pope's visit (later declared invalid by the High Court) and attempts by both Victoria and WA to hold juveniles in adult prisons. These laws breach common law rights to freedom of speech, movement and association, the right not to incriminate oneself, the principle of innocence until proven guilty, even in criminal trials. Only very occasionally have our courts been able to intervene to constrain the overreach of parliaments.

If each law is considered alone, the rationale for it might be reasonable and proportionate, especially if the aim is to protect national security. Perhaps, it might be reasoned, the prosecutors and government officials can be relied upon to moderate any possible abuse of the laws. One might consider that the risk to liberty posed by a particular law is relatively slight and is not worth defending at the barricades. But when we look back over the past two decades a pattern emerges. The whole has become much larger than the sum of its parts.

As Chief Justice of NSW Tom Bathurst has put it:

"Many small encroachments, taken individually, arguably have little effect. Taken cumulatively over time and across state, territory and commonwealth jurisdiction, they can be a death by a thousand cuts of significant aspects of our rights and laws that maintain our democracy".

A Charter of Rights for Australia will better protect the rights of citizens, minorities and non-citizens and ensure a culture of respect for the rights that underpin our democracy - freedom of speech, the right to vote and equality. The tragic personal stories—Marlon Noble detained for 10 years without charge or trial on basis that he was not fit to plead to a criminal charge, Ms Dhu arrested for parking fines, dies in

police custody from injuries suffered in domestic violence, Al Kateb a stateless person whom the High Court concluded could be held indefinitely in immigration detention and Dillion Voller the Aboriginal youth restrained in a steel chair hooded and isolated – These cases along with generalised breaches of the rights of Indigenous people, juvenile detainees, asylum seekers, and the homeless, could be restrained or moderated if we enacted a federal Charter of Rights.

But this is all rather abstract. Let us look at a recent example.

Operation Fortitude

Many Melbournians will recall the afternoon of the 28 August 2015 when Flinders Street was blocked by demonstrators brandishing placards with slogans: 'No One is Illegal'; 'Stop Racism Now'; 'Border Force Off Our Streets'. That morning the federal government's Border Force had issued a media release announcing a two-day blitz targeting 'crime in the Melbourne Central Business District'.

The media release for Operation Fortitude promised that Australian Border Force (ABF) officers would be positioned around the city, 'speaking with any individual we cross paths with'. It warned people to be aware of their visa conditions and that it would be 'only a matter of time before you're caught out'. ABF's inaugural Commissioner, Roman Quaedvlieg, declared that he would defend Australia's 'utopia' at sea, at border entry points and on home soil -echoes of Churchill's 'defend them on the beaches speech'? By 2:00pm, social media around Australia was alight with angry references to racial profiling. Protesters gathered on the steps of Flinders Street Station. Including politicians, city councillors, unionists and lawyers, expressing reservations and outright alarm. Victoria Police issued a statement saying the operation would not go ahead because of 'community concerns'. Border Force leaders rapidly backed away, blaming lower-level minions for the fiasco.

It is true some people in the community do not have a valid visa or have overstayed their tourist, student and migrant worker visas. It is also true that Australia has a sovereign right to arrest and deport those who are in the country illegally. The Australian Federal Police and other law enforcement officers regularly do so, if quietly, under a section of the *Migration Act* that requires 'probable cause'. But we have never had Border Force officers stopping people in shopping malls, demanding identification. The subsequent investigation by the National Audit Office (NAO) found that the *Border Force Act* 2015 had extended the 'coercive' powers to question, search, detain or arrest from a small number of officers to 15,000 Immigration and ABF employees.

In March 2018, the appointment of the ABF Commissioner was withdrawn by the Governor General for apparently unrelated abuses of office.

Was Operation Fortitude a triumph for democracy and people power through social media? A sinister 'Big Brother' conspiracy for social control? Or just an example of

foolishness and incompetency? How is it that public officials did not caution that questioning without probable cause would be inconsistent with our liberties? Are our government officials so ill-informed about civil rights that no one challenged so obvious a violation of the freedom to walk the streets without fear of being stopped and questioned by border protection officers?

Although I take comfort in the speed with which so many in the community reacted to protect their liberties—a healthy sign for the future—Operation Fortitude is but one illustration of the scores of laws and policies that infringe common law freedoms and expand executive powers.

We – and most relevantly-the courts, have no national Charter of Rights with which to stop them.

The aborted operation exposed a wholescale expansion of powers of staff across the Department of Immigration in apparent preparation for the creation of the Australian Border Force and the new 'Super Ministry' of Home Affairs, created last year. The Super Ministry, modelled on the United Kingdom's Home Office, and headed by Peter Dutton, the Minister for Immigration and Border Protection, creates a federation of border and security agencies including ASIO, the Australian Federal Police, Border Force, the Australian Criminal Intelligence Commission, the Australian Transaction Reports and Analysis Centre, and the Office of Transport Authority. The wisdom of centralising these agencies may be doubted. In the past, they have been independent of each other so that their respective ministers could provide a check upon any abuse of power. It is also troubling that the Attorney-General will no longer have the same level of supervision over the actions of the agencies that have been moved from his portfolio to that of the Super Minister. Legislation to give effect to the creation of a Super Ministry has yet to be subject to parliamentary debate or passed by parliament.

Executive discretion: is this something to worry about?

The idea of executive discretion, or of an overreach of that government power, does not excite much passion. I suspect most people do not understand that their elected representatives have extensive powers that are not subject to judicial supervision. The limits to executive discretion and the doctrine of the separation of powers among government, parliament and judiciary seem abstract, even arcane, principles of Constitutional law. But they are important to our democracy. Australians are poorly educated about the Commonwealth Constitution (perhaps explaining, but not excusing, the failure of our elected representatives to understand the section prohibiting dual citizenship).

Will a Charter of Rights be a solution?

It is true that human rights are adequately protected for most people in Australia most of the time.

The Australian Law Reform Commission has recently identified 121 federal laws that infringe our democratic rights, including laws that risk freedom of speech, such as

secrecy offences, mandatory data retention laws; offences for advocating terrorism, prohibiting terrorist organisations and imposing preventative detention and control orders. Any disclosure of information about 'special intelligence operations' will attract a mandatory five- or ten-year penalty, while ASIO officers retain total immunity from civil and criminal prosecution when engaged in these operations.

- There are at least 52 examples of legislative reversals of the presumption of innocence.
- Mental intention or negligence have traditionally been a critical element of criminal responsibility. Yet recent federal laws impose strict and absolute liability, not only in the relatively well-known areas of counter-terrorism and migration laws but also upon corporations and for prudential and environmental regulation, for commercial scale copyright infringement, for associating with a terrorist organisation or entering a 'declared area', and for disclosure of information concerning an ASIO operation.
- We also now have laws that do away with the privilege against self-incrimination, particularly laws that provide no immunity from prosecution.
- Procedural fairness and the right to due process are threatened by the mandatory cancellation of visas on character grounds and misnamed 'fast-track' review processes for denying refugee status. The right to have a judge review a decision is especially at risk in these cases.
- Adding fuel to concerns that the Government is targeting advocacy by civil society, the Coalition has introduced the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* in response to what the Prime Minister referred to as 'disturbing reports about Chinese influence'. Foreign political donations will be banned. Only Australians and companies registered in Australia will be able to donate to political parties. A 'foreign influence transparency scheme' will require lobbyists working for a foreign power with the intent of changing Government policy to be listed, and thus to be publicly known.
- All this might arguably be defended as necessary and proportionate to the perceived risk. That is, until the practical effects of the proposed Bill are considered. Charities and research organisations say they could be unable to continue their work where they have usually received some foreign funds. Australia's largest media companies say the new espionage definition could see journalists thrown in jail for possessing sensitive information that is in the national interest. Universities Australia is worried the laws could stop research collaborations with overseas institutions, especially as the Chinese Government has partnered in many Australian university research projects. It remains to be seen whether the Bill will be amended to meet concerns or passed.
- Yet another disproportionate response to foreign influence and a threat to civil society is the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017.* The Bill captures a broad range of donors who are not 'allowable donors' and establishes a regime for registration and financial controls, to be enforced by severe penalties including ten years imprisonment. If the Bill is passed, it will impose a system of reporting that is

significantly more onerous than in the United Kingdom, Canada and New Zealand and is likely to have a chilling effect on free speech.

How has to come to this?

Compounding Australia's isolation from the language of international human rights is the fact that the Constitution protects very few rights: right to judicial review and freedom of religion, the right to compensation if property is taken; but other rights common to modern constitutions are not mentioned: freedom of speech is not included though the High Court implies a right of political communication; not quite the same thing.

Our Constitutional founding fathers did not mention the rights to privacy and freedom of movement and association; nor did they prohibit arbitrary detention. We might note that the PNG Supreme Court found unanimously that the detention of refugees on Manus is contrary to the Constitutional protection of liberty. Compared with the more recent constitutions of other countries, the Australian Constitution does not prohibit torture and slavery or racial or sexual discrimination. The rights of children, the disabled or aged are not mentioned. The Constitutional protections that do exist do not apply to the states and territories, the right to religious freedom being one of them.

International human rights treaties to which Australia is a party- ICCPR, ICESC, CRC, Refugee Convention- are not part of domestic law, except those with respect to race, sex and disability. They do form part of the jurisdiction of the AHRC creating a confusing situation where the Government is not bound by the treaties while the Commission has a statutory obligation to monitor the Government's laws and policies by reference to these very treaty obligations. The Government and Commission are like ships passing in the night.

Most concerning of all is the fact that the common law, the traditional check against executive abuse, is invariably ousted by the clear and unambiguous words of parliament.

Joint Parliamentary Scrutiny Committee

If human rights are not adequately protected by the Constitution, by legislation or by the common law, what are the other options?

Australia has evolved an essentially parliamentary approach to the protection of liberty. As parliaments enact the laws, they should also be guardians of common law freedoms and rights.

It became clear to me in my time at the Commission that Australians are most comfortable with an essentially parliamentary approach to human rights and indeed to all aspects of government. This makes sense. Parliamentary representatives have been elected by their constituents to give effect to the will of the people. The words of Parliament in the form of legislation are the voice of the communities it serves. It

seems perfectly logical to say that it is for the sovereign Parliament, not the courts, to make the laws that govern our lives.

Shortly after the Parliamentary Scrutiny Act was passed, and with renewed optimism, I wrote an article titled 'Australia's Human Rights: Coming in from the Cold'. I am a fan of *le Carre* spy novels. I was seriously premature. The *Scrutiny Act* has been a disappointing failure. After a promising start, with the Scrutiny Committee producing some consensus reports, voting broke down along party lines when, in 2015, the Coalition appointed Philip Ruddock as the chair. Since that time, the Scrutiny Committee has produced both majority and minority reports that reflect essentially political responses to the proposed law. The Statements of Compatibility often make a blanket statement, without analysis, that the bill in question complies with human rights—these Statements would, I fear, fail any law-school test of accuracy.

Moreover, politicians only infrequently mention the scrutiny committee reports when debating a bill. Even where a report draws attention to a possible human rights impact, it is invariably ignored on the floor of Parliament. When, in the glare of media and political attention, the Committee had the opportunity to make recommendations in respect to freedom of speech and the government's proposed reforms to section 18C of the *Racial Discrimination Act*, the Scrutiny committee could find a majority only to list possible options, little more than a statement of the obvious.

The fact is that federal and state Parliaments have repeatedly failed to protect human rights and have legislated to restrict even the most widely recognised freedoms. Parliament continues to chip away at our rights, creating a new norm of tolerance for human rights violations.

The failure of Parliament and our courts to protect human rights is clear, whether we look at the indefinite detention of asylum seekers, of people with cognitive disabilities, of Indigenous juveniles or of violent criminals. Aboriginal deaths in custody, domestic violence, racism in the delivery of health services, and gender inequality are witness to a dysfunctional parliament and disempowered courts. We need new laws to respond to emerging issues of our digital age, elder abuse, workplace discrimination against the elderly and disabled people. We also need better processes to deal with complaints of sexual assault and harassment, even in our universities.

In summary, Australia has reached a position in which fundamental freedoms are diminished by a failure of the legal tools available to comparable countries. In the absence of a Charter of Rights, we have few constitutional protections for our freedoms, limited legislation implementing our treaty obligations and a dysfunctional parliamentary system that does not stand against the overreach of executive power.

What are the courts doing to protect common law rights?

We have seen surprisingly little successful litigation challenging the exercise of executive discretion. Most ministerial discretions are unambiguously granted by parliament and respected by the courts.

A recent and encouraging example of the use of common law principles to resist ministerial discretion is the decision on 6 March 2018 by the Federal Court in AYX18. The Department of Home Affairs resisted attempts to move a 10 year old boy from Nauru to Australia for psychiatric treatment for self-harm and attempted suicides. The judge found Australia has a duty of care to the child because he was totally dependent on Australia for all sustenance and health care. The judge found that the child's mother had shown a sufficiently arguable case that her son is suffering from serious mental illness, posing a significant risk of suicide. He also found that the child could not be treated properly since the only psychiatrist on the island had departed and not been replaced. Accordingly, the Court issued a mandatory injunction to the Government to allow child into Australia for treatment.

He concluded, the next plane out of Nauru was the following day so… "to be quite clear, the boy and his mother should be on that plane'… a clear direction to the Government.

There has however been little scholarly analysis of the limits to executive power.

The *M68* case provides one the most useful analysis of the limits. The case concerned a Bangladeshi asylum seeker who challenged the attempt by the Government to return her to Nauru after she had been given medical treatment in Australia. She did so on the ground that her forced return amounted to a penalty and could be imposed only by a judicial body, arguing that the penalty breached the doctrine of the separation of powers. As the case moved closer to the day of the High Court hearing, it seems, public servants and legal advisors became aware that the *Migration Act* did not in fact authorise her removal to Nauru. To repair the defect, the Government introduced and Parliament passed an amendment to the M*igration Act* that permitted her removal retrospectively.

Accordingly, the majority of judges rejected her challenge, saying that the government could lawfully send her back to Nauru—thanks largely to the swift insertion by a compliant parliament of an amendment to the *Migration Act* that now authorised her return.

Justice Gordon was the sole dissentient among the seven judges and understood, in my respectful opinion, the correct legal position. She found the retrospective provision of the *Migration Act* to be invalid because it gives to the executive government a power to impose a penalty. Penalties lie exclusively within the purview of the judiciary.

By contrast, Justice Gageler, in a separate decision, accepted that the retrospective law ensured the detention was within the government's authority. The two judgments were so different because the judges were divided on the question of whether the detention was penal. Justice Gordon said the law was penal and therefore invalid

because it imposed a penalty that lies within the exclusive power of the courts. Justice Gageler, to the contrary, said the law was not penal if the executive detention was permitted by statute. In short, the court returned to the power of parliament to pass any law it likes.

I find the majority decision in *M68* chilling in permitting parliament to enact laws giving such wide powers to executive governments. I find it hard to imagine how the years spent in detention on Nauru do not constitute a penalty. Moreover, the court approved the imposition of a penalty retrospectively, breaching the criminal law principle that you cannot be guilty of an offence and thereby be liable to a penalty if the act was not an offence at the time of the act. While the mantra is repeated that executive power is to be interpreted by reference to the common law, the common law is being peremptorily ousted by the clear words of parliament. The common law has become an insubstantial spectre with little capacity to restrain Parliamentary excesses.

A Charter of Rights, even a simply legislated one, could moderate the almost unrestricted executive powers that can be granted by Parliament.

Do we need a Charter of Rights for Australia?

We have a serious deficit in the legal protection of human rights in Australia. We need to reconsider introducing a legislated federal Charter of Rights. Although some Commonwealth, State and Territory laws protect some human rights, no single document articulates these rights in a coherent and accessible way.

I do not propose a constitutionally entrenched Bill of Rights on the US model. Even I, a supreme optimist, do not think the body politic in Australia is yet ready to agree to such a profound change, especially as our political leaders see constitutional recognition of Indigenous peoples as a bridge too far. Even the more modest idea of a Charter of Rights—legislated by Parliament and subject to amendment at any time—will not be a panacea. But it could give the courts, Parliament and the community human rights benchmarks against which to assess the compliance of our laws with common law freedoms and our international obligations. A Charter of Rights for Australia would provide the missing check against the growing abuse of executive power over recent years and restore the increasingly challenged independence of the judiciary.

A Charter of Rights: What difference would it make? Reports of breaches could inform policy

A case that brings me to tears with sorrow and frustration is that of a young man, legally known as KA, one of four Indigenous youths with serious mental conditions held in a maximum security prison in the Northern Territory. In a 2014 report to federal Parliament in KA's case, I noted that steel restraints were being used against these young men. KA's guardian stated Mr KA had been held in a steel restraint chair on sixteen occasions, often for two hours at a time and injected with a tranquiliser.

KA's legal advocate reported that KA spent an average of about sixteen hours a day in isolation in maximum security, and that he was frequently shackled when allowed outside his cell. Rereading the lengthy report since leaving the Commission, I find KA's story is a contemporary tragedy, from his birth and disrupted, often brutal upbringing to his continued detention today, having 'aged up' to an adult facility.

The Commission's report was ignored by both the federal and Northern Territory Governments. Two years later, *Four Corners* released CCTV footage of the treatment of juveniles at the Northern Territory's Don Dale detention centre, sparking a Royal Commission. If Australia had a national Charter of Rights, a judicial ruling could have stopped that illegal treatment much earlier. Instead, justice continues to depend on the vagaries of media reports and the outrage generated by CCTV footage—if only at those rare times when it leaks into the public arena.

Juveniles held in adult facilities

Victoria's Charter of Human Rights and Responsibilities offers many examples of cases where a charter has made a positive difference. In one of these, human rights lawyers took the Victorian Government to court on behalf of fifteen boys, aged sixteen and seventeen, who were being held at the adult Grevillea Unit inside Barwon Prison. The teenagers had been transferred there after their accommodation at Melbourne's Parkville Youth Justice Centre was destroyed during riots in 2016.

During the 2017 trial challenging the government's treatment of the boys, the Victorian Supreme Court released the first publicly available footage from inside the Barwon unit. The images showed teenage boys being capsicum-sprayed during a prison disturbance. Justice John Dixon found that using capsicum spray within the youth area of the prison was unlawful, saying that the juvenile detainees risked developing mental health problems in the prison environment including depression, anxiety and paranoia. He concluded: 'The limitation on the human rights imposed on the detainees was not demonstrably justified in a substantive sense as reasonable in a free and democratic society based on human dignity, equality and freedom.'

Justice Dixon's decision was informed by Victoria's *Charter of Human Rights and Responsibilities Act 2006*. His order to return the juveniles to the Parkville facility was, in contrast, denied in a similar case of detention of juveniles in an adult facility before the West Australian Supreme Court, where there is no legislated charter of r

Queensland's 'Bikie' laws

Under Queensland's *Vicious Lawless Association Disestablishment Act 2013*, ten or twenty-five years can be added to a defendant's sentence merely for being an associate of a declared criminal organisation. There is no possibility of parole. The laws drastically limit the rights to liberty, to equality before the law, to freedom of association, to peaceful assembly and to a fair trial. The maximum penalty for affray is one year's imprisonment but a 'vicious lawless associate' could receive seven years for the affray, plus twenty-five years for being an office-holding associate. This could result in a thirty-two year sentence. The laws are an unreasonable and disproportional

restriction on common law rights. Under a Federal Charter of Rights, the law would fail the reasonable limits test and could not be overridden for exceptional circumstances. The Queensland law would be inconsistent with a Federal law and therefore invalid.

Marlon Noble

Marlon Noble is an Aboriginal man who has a cognitive disability after contracting meningitis as a child. In 2001, he was accused, falsely as it turned out, of sexually assaulting two young girls. The alleged victims and their mother denied this ever happened. Noble was not fit to stand trial. Under Western Australia's *Mentally Impaired Defendants Act* he was held in a maximum security prison in Geraldton for ten years without trial or conviction for any crime.

A complaint on Noble's behalf to the UN Committee on the Rights of Persons with Disabilities found that the:

'indefinite character of (Noble's) detention and the repeated acts of violence he was subjected to during his detention'

amounted to a violation of the Convention on the Rights of Persons with Disabilities. The UN committee found that the Western Australian Government should compensate Noble and that the state law's provision for indefinite detention of people found unfit to plead should be removed. Noble has since been released from maximum security but remains subject to stringent restrictions 24/7 on his movements and lifestyle.

A Charter of Rights could have spared Noble this ordeal. Had such a Charter existed, an Australian court could have stepped in to order regular judicial supervision to ensure fair treatment for a person with cognitive disabilities being held indefinitely on the dubious basis that they are not fit to stand trial.

I accept that some people with cognitive disabilities are dangerous and cannot be released into the community. But even if they have to be detained, they are entitled to humane treatment and conditions and, above all, to monitoring by an independent judge or tribunal.

How would a charter protect rights? Britain's Law Lords

In my time as Director of the British Institute of International and Comparative Law in London I was privileged to work with the Chair of the Institute's Board, the late Tom Bingham. Grandly titled Baron Bingham of Cornhill, he was Britain's senior Law Lord and—upon his death in 2010—widely described as one of the United Kingdom's great judges of the twentieth century. One obituarist, in *The Guardian*, said hearing Bingham argue was 'like watching an expert knife thrower'.

Bingham had a strong commitment to common law freedoms and wrote a witty and erudite book, *The Rule of Law,* which I reread when in despair over Australian government directed human rights breaches. He describes how the Law Lords responded to the UK Government's indefinite detention of foreign nationals suspected of involvement in terrorism.

When such detentions were challenged before the House of Lords in the *Belmarsh* case in 2004, Lord Bingham, joined by six other Law Lords, decided, seven votes to one, that detention without trial was illegal. Such detentions did not rationally address the perceived threat to security; was neither necessary or proportionate to the risk; and was unjustifiably discriminatory against foreign nationals on the ground of their nationality. Accordingly, the Court issued a Declaration of Incompatibility with the human rights protected by the UK *Human Rights Act.*

Another Law Lord, Lord Hoffman, took a different approach in finding that the United Kingdom could not opt out of its international obligations. Memorably, he said:

> The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.

The *Belmarsh* decision was a powerful reminder to the UK Government that it must act within the law and illustrates the so-called 'dialogue' model that gives the courts a power to declare inconsistent laws, but not to change them, leaving it to Parliament to adjust the legislation. The respective roles of the judiciary and parliament are thus preserved.

The years I spent at the British Institute showed me how the UK *Human Rights Act* promotes justice by informing the actions of government officials. Some injustices are litigated in the courts but most are dealt with by bureaucrats who are usually well versed in the human rights protected by UK legislation. British citizens speak the language of human rights and are quick to insist on the rights they are entitled to under the European Convention on Human Rights.

The path to a Charter: A long and winding road

Proposals for a federal Charter of Human Rights are not new. In 2008, the federal government appointed Frank Brennan to head a national consultation on a statutory bill of rights for Australia. He consulted widely and in 2009 produced a report proposing the introduction of a federal Human Rights Act. The report favoured a 'dialogue' model, which sets out a list of human rights as benchmarks for the courts.

A federal Charter of Rights: What are the argument for and against?

'Opening the floodgates' to litigation is a widely spruiked consequence of passing a

human rights act. To the surprise of opponents in many states and countries, it hasn't happened. Nor have such acts wrested law-making power from parliaments, or led to a hyperactive judiciary. The ACT's *Human Rights Act 2004* has been mentioned in an average of 8.1 per cent of cases since its enactment and only 1.6 per cent of cases in Victoria have mentioned its *Charter of Human Rights and Responsibilities* since it became law in 2006. After 10 years of the *Human Rights Act* in the United Kingdom, only 2 per cent of cases concerned a human right. The real value of human rights acts lies in their symbolic, educative and informative roles, restraining parliaments from passing laws that infringe fundamental rights, and ensuring administrators do not impose policies that do so. When protections for human rights get legislative expression, they form the scaffolding for a social culture that respects rights for communities and individuals.

A legislated Charter of Rights cannot be disregarded and will encourage compliance without resorting to litigation, as the Victorian experience shows. As a list of rights and freedoms, a Charter can inform all discussions, especially on the floor of parliament, as a benchmark that should be taken into account at the early stages of policy development. In those few cases that proceed to court, a Charter will send a law that is incompatible with rights back to parliament for reconsideration.

It is not proposed that Australian courts should be the final arbiter of rights, as occurs in the United States eg in *Obergefell,* (applying the 14th Amendment on equality before the law), the seminal same-sex marriage case. The 'dialogue' model, in which a statement of incompatibility is made and the matter referred back to parliament, preserves the supremacy of parliament and representative democracy.

Many political leaders, scholars and some in the media argue against the wisdom of enacting a Charter of Rights for Australia. They rightly point out that nations that most egregiously breach fundamental freedoms also have entrenched bills of rights. The argument constructs a straw man. Charters of Rights will not guarantee compliance with fundamental freedoms in the absence of representative democracy, a culture of respect for human rights and an independent judiciary.

Those opposing a Charter of Rights also claim that political issues are for Parliament and judicial matters are for the courts. Never the twain shall meet. This not just a simplistic view. It is a false argument. Politics, parliament and the courts interact and overlap constantly. Legal and political questions are invariably intertwined. A political issue will typically be resolved by the passing of legislation that is then interpreted and applied by the courts. A policy is agreed at the political level, Parliament passes legislation to give effect to the policy and the new law is applied to the facts by a judge.

Sometimes, reform is achieved the other way around. The courts may provide the impetus for change by interpretation and revision of long established jurisprudence. Examples include the High Court's decisions in *Mabo (No 2),* rejecting the idea of *terra nullius,* in *Tasmanian Dams,* interpreting the external affairs power to support legislation implementing a treaty, or *Teoh,* creating a 'legitimate expectation' that government officials will take treaty obligations into account when making decisions. Parliament then has the task of implementing the new legal approach or, possibly,

passing laws to overturn the judicial interpretation to enforce a different political solution.

Most often argued is the view that a Charter will enable activist judges to create the law according to their own lights. Have we forgotten who first articulated our common law freedoms? It has been the judges. From the 13th century, English judges have recognized changes in community norms and crafted the law to reflect societal changes. Australian judges are not harbouring desires to make law, they are conservative and understand their roles are limited to interpreting the law as Parliament defines it.

Conclusions

Timing is everything in politics. Australia has just been elected to the UN Human Rights Council from 2018. Engagement with the council may help persuade Australia's politicians that it is important to meet our international human rights obligations. The recommendations of the Human Rights Council's Universal Periodical Review in 2016 diminish Australia's credibility in chastising other nations for their human rights abuses. Some indication that our government respects the international monitoring processes would be welcome. The recently elected Queensland government is currently drafting a Charter of Rights. The road ahead may not be straight or smooth but a human rights act for Queensland has the potential, along with the current Charters of Rights in Victoria and the ACT, to build national momentum to enact a charter for all Australians. I am also encouraged by suggestions that Labor's Shadow Attorney-General, Mark Dreyfus, is considering a federal Charter of Rights if his party wins the next election in 2019.

A Charter will also allow Australia to meet its international obligations and resume its leadership position globally and regionally as a good international citizen. Above all, Australia could return to the rule of law and to the principles of legality upon which our democracy is based.