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An Australian Perspective on the UK Human Rights Act Debate

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About Insights

Insights captures the ideas and work-in-progress of the Fellows of the Institute of Advanced Study at Durham University. Up to twenty distinguished and 'fast-track' Fellows reside at the IAS in any academic year. They are world-class scholars who come to Durham to participate in a variety of events around a core inter-disciplinary theme, which changes from year to year. Each theme inspires a new series of *Insights*, and these are listed in the inside back cover of each issue. These short papers take the form of thought experiments, summaries of research findings, theoretical statements, original reviews, and occasionally more fully worked treatises. Every fellow who visits the IAS is asked to write for this series. The Directors of the IAS – Veronica Strang, Rob Barton, Barbara Graziosi and Martin Ward – also invite submissions from others involved in the themes, events and activities of the IAS. *Insights* is edited for the IAS by Nicholas Saul. Previous editors of *Insights* were Professor Susan Smith (2006–2009), Professor Michael O'Neill (2009–2012) and Barbara Graziosi (2012-2015).

About the Institute of Advanced Study

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The focal point of the IAS is a programme of work associated with, but not exclusive to, an annual research theme. At the core of this work lies a prestigious Fellowship programme. This programme gathers together scholars, intellectuals and public figures of world standing or world-promise to address topics of major academic or public interest. Their mission is to anticipate the new and re-interpret the old, communicating across and working between disciplinary boundaries.

Every year, the Institute invites as many as twenty highly creative individuals to spend up to three months in Durham. They are located in Cosin's Hall, a magnificent and spacious 18th century mansion which, together with Durham Cathedral and Durham Castle, forms part of Palace Green, dominating the World Heritage Site of Durham Peninsula. During their stay, Fellows engage with departments and colleges, deliver public lectures and seminars, and, above all, join an international community of researchers to address the theme selected for that year. Further details of the IAS and its Fellowship programme can be found at www.durham.ac.uk/ias/fellows

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AN AUSTRALIAN PERSPECTIVE ON THE UK HUMAN RIGHTS ACT DEBATE

The UK Human Rights Act has played an important role in protecting human rights in the UK, but has also come under sustained attack, particularly from members of the Conservative Party. The Cameron government proposed to repeal the Act, and to replace it with a British Bill of Rights. The object of this paper is to provide an Australian perspective on this debate. This experience is pertinent because Australia has twice enacted modified versions of the Human Rights Act that respond to some of the concerns that have arisen around the UK instrument.

The long-running debate over the future of the UK Human Rights Act has reverberated around the common law world, indeed all the way to Australia. This is because the Act is more than just an instrument of human rights protection for Britain. It also stands as evidence of how rights can be safeguarded without constitutional entrenchment or conferring supremacy upon the judiciary. As such, it stands in contrast to the world's most influential model of domestic human rights protection, the United States Bill of Rights. The UK Human Rights Act is of course not the first instrument of this kind. *The Canadian Bill of Rights* 1960 and the *New Zealand Bill of Rights Act 1990* are prior examples, and with the UK law have become known as the 'Commonwealth model' of human rights protection. It is fair to say though that the UK model is of the greatest international significance. It is a more refined version of this approach to human rights protection. The UK law is also of undoubted political significance owing to its being enacted in the home of Westminster democracy. The importance of the Human Rights Act as an exemplar of human rights protection can certainly be seen in Australia. The Australian debate on national human rights protection was going nowhere throughout the 1990s. This was due to the debate focusing mainly upon the prospect of bringing about a Bill of Rights in the United States form.

The UK Human Rights Act was an important catalyst in shifting the Australian debate back to proposals for legislative change. It provided striking evidence of a different path that Australia might follow. I remember this well because the adaption of this model in Australia formed a key part of my PhD thesis, published in 1999 as *Human Rights under the Australian Constitution* (Williams, 1999). In that book I argued that Australia needed a national scheme of human rights protection, and that this should be brought about not by following the United States but by adapting the UK Human Rights Act. Professor Hilary Charlesworth made the same argument, and collectively these and other works led to a shift in thinking about the next step forward for Australia.

This shift was so significant as to produce the first successes in Australian legal history towards some form of Bill of Rights. This occurred at the state and territory level. The first tomove was the Australian Capital Territory (ACT), which, after a community consultation led by Hilary Charlesworth, enacted a *Human Rights Act* in 2004 (Department of Justice and Community Safety, 2003). The second was Victoria, which, after a community consultation I chaired (Department of Justice, 2005), enacted its *Charter of Human Rights and Responsibilities* in 2006.

These instruments are based upon the UK model. They provide for enhanced parliamentary scrutiny, a new interpretive function for the courts and for courts to declare legislation to be inconsistent with human rights. They also amount to significant adaptions of the UK Human Rights Act. These adaptions were themselves inspired by the UK model, which has since suffered such significant political and media pushback as to create a full-blown crisis surrounding the statute.

In response, design choices were made in drafting these Australian models so as to head off a like response in Australia. These choices might in turn provide ideas for the current debate over the drafting of any Human Rights Act version 2.0. In particular:

- Each Australian model was preceded by a lengthy process of community consultation and education. The aim here was to base a new regime of rights protection in a sense of popular legitimacy and to incorporate concepts used by the community, as shown for example in the use of 'responsibilities' in the title of the Victorian Charter.

- Each instrument has been grounded purposefully in the notion that they express Australian conceptions of human rights, rather than human rights principles derived from international sources. Hence, the rights are not dependent upon conventions or other international documents (and so are not referred to as article 6, 7 or 8, etc. rights). In many cases, modifications have been made to the rights so that they are set out in a form that is more consistent with Australian legal and community norms. In doing so, the ACT and Victoria accepted the premise that underlay the enactment of the Human Rights Act, that is, of 'Bringing Rights Home' (Secretary of State for the Home Department, 1997), but sought to achieve this in a way that gave greater emphasis to notions of domestic political authority.

- The ACT and Victorian laws go further than the UK Human Rights Act in emphasising the centrality of Parliament in the rights protection process. For example, in the case of the Victorian law:
  - When it comes to statements of compatibility, the Victorian Charter goes further than the UK Human Rights Act in requiring the person introducing a bill to provide a justification as to why it is compatible with the protected human rights or, if it is incompatible, an explanation of the nature and extent of incompatibility.
  - The interpretative function of the courts is limited by a requirement that any interpretation given to a statute must be 'consistent' with its purpose.
  - When a court finds that a law cannot be interpreted consistently with human rights, it is empowered to issue a declaration of inconsistent interpretation, rather than a declaration of incompatibility. The use of the word 'interpretation' emphasises that the court has merely reached a different interpretation than Parliament, rather than its being a definitive finding that human rights have been breached.
  - Parliament can make an override declaration, declaring that the Bill infringes human rights. A member of Parliament must explain the exceptional circumstances which justify the infringement. Such a mechanism is not strictly needed given Parliament's, ongoing power to amend or suspend the Act. It nonetheless provides a vehicle for doing that within the terms of the legislation, and in doing so emphasises the ongoing sovereignty of Parliament.

- Both Australian instruments were drafted with the goal of improving the human rights of vulnerable people through the most effective means possible. It was accepted that the courts would not normally provide such a means, even if they were necessary and important in particular cases. Instead, the most effective protector in a day-to-day

sense would usually be the executive through its provision of services (in areas such as aged care, health and education). To facilitate this, the enactment of the Charter in Victoria was preceded by extensive engagement with the executive so as to build ownership and respect for the instrument among public servants. Charter consultations were held with every department, and the drafting of the Charter was supported by an interdepartmentalcommittee representative of the entire public service. This led to a number of innovations, including changing practices within departments to apply the Charter, and new cabinet processes to ensure that Charter rights were considered at the highest levels of executive decision-making. Upon its enactment, the Victorian Charter was also accompanied by training and other measures for government employees to enable them properly to implement the Charter. The Charter has also been integrated into a range of performance and other measures within departments. This and other initiatives, including designating people within departments as 'Charter champions', has produced change in many areas of policy and practice, such as by improving the provision of disability services and conditions for the detention of people with a mental illness.

- Finally, each instrument was not enacted with a view to its being the final step in the rights protection process, but only as a first measure. Hence, these instruments have been the subject of regular review and amendment. In the case of the Victorian Charter, these are mandated by the Charter itself to occur four and eight years after its enactment. The most recent report on the Victorian charter was delivered in 2015 (Young, 2015). That 267-page report, based upon extensive community and NGO involvement, makes 52 recommendations for enhancing the instrument, including by way of further developing a culture of human rights protection within the executive and legislature.

These drafting decisions reflect the character of these instruments as being based in community values about human rights protection, and as being organic instruments in the sense that they can and will be altered by Parliament, hopefully to ratchet up human rights protection over time.

In 2009, a National Human Rights Consultation involving over 40,000 Australians recommended a national model in a like form (National Human Rights Consultation Committee, 2009). However, the Labor government of the time, embroiled as it was in leadership turmoil, did not move forward with this recommendation. It instead put forward legislation, the Human Rights (Parliamentary Scrutiny) Act 2011, to enhance scrutiny by the federal Parliament on human rights grounds.

It is important to set out these developments because they make clear how the evidence provided by the UK Human Rights Act has affected the Australian debate by way of inspiring reform and shaping legal development. This has been true not only in regard to the strengths of the UK instrument but also in regard to its perceived weaknesses.

It is no surprise then that debate over the future of the UK Human Rights Act is equally having a significant role in shaping ongoing debate in Australia. The UK debate is oftenreferenced in Australia by way of misrepresentation. It is stated that the UK Conservative government is determined to abolish the Human Rights Act. It is said that it has adopted this policy because the Act has failed, and so the UK would be better off without any such instrument. No mention tends to be made of the particular factors underlying the debate, including the perception that the European Court of Human Rights wields excessive influence. Nor does mention tend to be made of the fact that the government's policy is not merely to repeal the instrument but to replace it with a British Bill of Rights (*Conservative Party Manifesto*, 2015).

These additional factors are no doubt neglected because they get in the way of the convenient and simple narrative that the UK has finally woken up to the fact that national protection of human rights is a bad idea. Such an argument is useful in Australia because momentum is building once again for human rights reform, whether at the national level, or in Queensland, which is poised to begin an inquiry into whether it should follow the ACT and Victoria in legislating for a human rights act.

For those who follow UK law more closely, there tends to be a different reaction to the debate over the Human Rights Act. People such as myself wonder whether they are missing some key aspect to the debate, because from afar, and with respect, it seems to be premised on a number of problematic propositions.

Having visited the United Kingdom many times over the last two decades, and having spoken to the players in a process that led to the development of the Human Rights Act, it is clear that there is substantial evidence that the Act does have a political problem. It is poorly understood, and has never attained the level of legitimacy that human rights instruments have gained in other nations, such as Canada. The European angle has also proved to be an effective lightning rod for dissent, even though of course more recent court decisions in the United Kingdom have made it clear that such influence cannot be determinative.

It is the policy of the UK government to 'break the formal link between British courts and the European Court of Human Rights, and make the [UK] Supreme Court the ultimate arbiter of human rights matters in the UK' (*Conservative Party Manifesto*, 2015). It is not clear though how this can be achieved within Britain's current supra-constitutional framework, nor why this should involve more than minor amendment to the Human Rights Act itself.

If this is really a problem, why not simply alter section 2(1) of the Human Rights Act to make it explicit that the Supreme Court does indeed have the final say? It is far from clear that such an amendment is necessary given the existing terms of that section, but it is a measure that could be adopted if this is a genuine concern.

The debate is also hard to fathom because it is not clear why replacing one set of rights with another set in a differently named instrument is needed. Hence, it is not clear why the pledge of the Conservative party at the 2015 general election to 'scrap the Human Rights Act and introduce a British Bill of Rights' (*Conservative Party Manifesto*, 2015) is more than an exercise in semantics. If there is a desire to sever the connection to the Convention, then this again could be done within the framework of the Human Rights Act. Of course, it is not clear why this would be desirable, nor how British rights would be different in substance to those already encapsulated in the Human Rights Act. Again, from afar, the debate seems to be more about politics than rational legal development.

Finally, the debate makes little sense because, from an Australian perspective, the perils of weakening the UK Human Rights Act are all too obvious. The absence of an effective national scheme of human rights protection in Australia has had a devastating impact on the, preservation of human rights over the longer term. The denial of democratic rights to Aboriginal peoples is an obvious example, as are Australia's recent, brutal policies with regard to asylum seekers.

Other pertinent examples relate to laws for countering terrorism. Many of these have been adapted from the United Kingdom, such as those with respect to control orders, and it is telling that in the absence of a human rights framework the Australian laws have been more severe and frequent than those in the UK.

Since September 11, the Australian Parliament has enacted 65 separate anti-terrorism statutes. At the height of this lawmaking in the six years after September 11, the federal Parliament enacted such a statute on average every 6.7 weeks (Williams, 2011). These have achieved extraordinary things, often in a way that is troubling for the rule of law. These include giving a power to our domestic spy agency to detain Australian citizens not suspected of any crime for up to a week. While detained, a person must answer, without exception, any question put to them, or face jail for five years. A journalist who reports on this, including to expose wrongdoing, can also be jailed for five years. Not even Israel has adopted such a regime.

The most recent example of such legislation is the Australian Citizenship Amendment (Allegiance to Australia) Act 2015, which was developed from the British Nationality Act 1981. In the Bill as first introduced into Parliament, Australia took this and went much further in proposing the automatic revocation of the citizenship of dual nationals without the person even having to receive notification of this, let alone having any right to a hearing. The first a person might have heard that they have lost their citizenship is when they receive a knock on the door from the authorities to remove them for deportation. This could apply not only to terrorists but also to people convicted of minor crimes, such as graffiti artists who have damaged federal property. The citizenship of the person's children could also have been revoked.

As finally enacted in December 2015, these powers have been very substantially amended in response to an inquiry and concerns about the constitutionality of the legislation. These amendments improved on the Bill as originally introduced. The list of offences triggering citizenship loss no longer include the offence of damaging federal property, and the law does not apply to the conduct of children under the age of 14. However, the citizenship of children between the age of 14 and 18 years may still be revoked, and recourse to basic legal rights, such as natural justice, are limited. The law has also been amended to make a key part of the regime retrospective. The result is a law that is deeply troubling from a human rights and rule of law perspective.

The UK of course has more than its own share of overreaching national security laws. However, the Australian evidence shows how much greater the problem can be when national human rights protection is removed. In such a circumstance, political pressures and the media can have an influence on the debate even greater than is currently the case. Australia demonstrates what is possible when the only impediment to abrogating basic rights may be the wisdom and self-restraint of the nation's elected representatives.

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