

## The Australian Constitution and Our Rights

Cheryl Saunders

**The Australian** Constitution says very little about human rights. In contrast to the Constitutions of most other Western countries, which list a range of rights and provide legal protection for them, the Australian Constitution includes only a small handful of provisions that deal expressly with rights. A few other rights have been implied from the text and structure of the Constitution. Apart from these, Australia relies on institutional mechanisms for rights protection: the Parliaments and governments of both the Commonwealth and the States and independent courts applying common law principles. This chapter describes and explains how various arrangements work, as a necessary basis on which to consider whether more extensive constitutional protection of rights would be useful and desirable in Australia.

It may be helpful at this stage to clarify what we mean when we talk about human rights. At their most basic, human rights are designed to ensure that each person can live with dignity; free from fear, persecution and violence; productively; and harmoniously alongside others. As the understanding of human rights has developed, within countries and under international law, they are often conceptualised in several categories. Civil and political rights provide a framework within which people can participate as equals in a democratic community, subject to the rule of law. They include, for example, the right

to vote, freedom of speech and protest, personal liberty, the right to property and various guarantees of fair treatment, both generally and under the criminal law. Many of these rights require restraint on the part of governments in exercising the authority of the state. A second category of rights comprises economic, social and cultural rights: to housing, to education, to health care, to employment, to live in accordance with your own customs and traditions. Many of these rights require positive action on the part of governments in managing the resources of the state. A third category of rights, which are likely to become increasingly important, concern the environment. These require positive action on the part of the state as well.

Most of the discussion about whether and how a Constitution should protect rights focuses on the first of these categories: civil and political rights. This chapter will focus on these as well. We note, however, that this does not imply that the other categories of rights are unimportant. It merely reflects the dominant view that they are more difficult to protect by constitutional means. We also note that the dominant view is strongly challenged by developments elsewhere. Famously, the South African Constitution has experimented with a way of effectively protecting social and economic rights, with promising results. And in 2005, the Constitution of France was amended to include a Charter for the Environment, which commits the state to public policies that protect sustainable development.

Australia is fortunate in the stability and efficiency of its democracy and the commitment of its institutions to the rule of law. The Australian legal and political system also stems from a tradition that accepts that the rights of individuals should be respected by the state. As a result, so far, the Australian approach to rights protection has worked reasonably well. By international standards, Australia has a good human rights record. Australia is regularly ranked highly in international assessments of the most desirable places in which to live. Such rankings typically take into account the protection of human rights.

The Australian record is far from perfect, however. On this ground alone, the Australian approach to rights protection deserves critical scrutiny. Nor can Australia afford to be complacent about maintaining even present standards of rights protection. The Australian approach relies heavily on a political culture that respects rights. Political culture changes over time and Australia does relatively little to reinforce the understanding of the significance of rights and the willingness to give them priority that such a culture requires.

Some evidence for the shortfall in rights protection comes from the findings of international bodies in relation to, for example, the treatment of indigenous Australians and asylum-seekers. Other evidence, ironically, comes from decisions of courts enforcing other constitutional or statutory provisions that indirectly identify actions by governments and parliaments that appear to have infringed rights. Some examples are set out below. In some cases the infringement of rights is deliberate. In others, however, it is inadvertent; the consequences of implementation of a policy without fully considering its rights implications, in the absence of a constitutional incentive to do so.

The following are examples of situations in which government action that appears to infringe rights has been identified in judicial decisions, which sometimes also have provided a remedy. The right most obviously in issue is identified in brackets after each example:

- removal of the right of prisoners to vote, no matter how short their sentence (right to vote)
- creation of a criminal offence to criticise the Industrial Relations Commission in a way that is ‘calculated’ to bring it into ‘disrepute’ (freedom of speech)
- protection for the official bicentennial of British settlement in 1988 that prevented a group of Aboriginal Australians from selling t-shirts with a slogan that read: ‘1788–1988: 200 years of suppression and depression’ (freedom of speech)

- dissolution of the Communist Party of Australia (freedom of association)
- indefinite detention of a 25 year-old asylum seeker who was stateless and could not be deported to another country (liberty)
- continued incarceration of a person who had served his sentence but was deemed still to be dangerous to the community (liberty)
- criminalisation of homosexual conduct between consenting adults (equality)
- compulsory acquisition of property without adequate compensation (property)

We will return to some of these examples in the discussion that follows.

### **Express Constitutional Provisions that Protect Rights**

This part identifies the few express rights-type provisions in the Australian Constitution and describes what they do. We use the term ‘rights-type provision’ because these provisions tend to be expressed as limits on Commonwealth power, rather than as positive rights. By way of example, the provision dealing with religious freedom, described below, prohibits the Commonwealth from making a law to affect religious freedom in particular ways. In contrast, section 2 of the Canadian Charter of Rights and Freedoms recognises that ‘Everyone has the following fundamental freedoms’ and goes on to list five such freedoms, including freedom of conscience and religion.

Property rights receive some protection from section 51 (xxxii) of the Constitution. This paragraph gives the Commonwealth Parliament power to acquire property and then limits the power by requiring property to be acquired ‘on just terms’. This means that people have the right to be fairly compensated if their property is acquired under a Commonwealth law. Like most of the constitutional provisions dealing with rights protection, the section does not apply to

State law. The States have legislation that requires them to compensate people if their property is acquired but this legislation does not have constitutional status.

Trial by jury is protected under section 80 of the Constitution. A jury trial involves 12 ‘ordinary’ people in determining whether an accused person is innocent or guilty and it is therefore an important aspect of due process in the criminal law. The section guarantees jury trial only for any ‘indictable’ offence under Commonwealth law. It is up to the Commonwealth Parliament to decide whether to use the particular procedure of ‘indictment’ or not, but most serious offences are expected to be tried in this way. Again, section 80 applies only to Commonwealth offences, not to offences under State law, which are governed by State legislation.

Some aspects of religious freedom are protected by section 116. The section prevents the Commonwealth Parliament from enacting a law that would establish a national religion, impose a particular religious observance, prohibit the observance of a particular religion or require a religious test as a qualification for holding public office. Consistently with the provisions dealing with property and trial by jury, the section protects religious freedom only against Commonwealth and not against State action.

Finally, two sections provide a guarantee of internal mobility within Australia or, in other words, the right to move freely around Australia. Under section 92, ‘trade, commerce and intercourse among the states’ is required to be ‘absolutely free’. While this section has obvious commercial overtones, it is accepted to apply to non-commercial movement of people as well. The effect of section 92 is reinforced by section 117, which prevents discrimination against citizens operating in one State on the grounds that they live in another State. Both these sections were important to the original goals of federation in Australia and, unlike the sections considered earlier, they impose limits on what the States can do. The prohibition in section 117 is not absolute; States can favour their own

residents in certain critical respects. For example, State laws confer the right to vote only on residents of the State.

### **Implied Rights**

In addition to these express provisions there are a few rights (sometimes also called guarantees or freedoms) that have been recognised as the necessary result of the system of government that the Constitution establishes. In this sense, these are ‘implied’ from the text and structure of the Constitution.

The implied rights fall into two categories. One group is associated with the provisions of the Constitution establishing the Parliament and government. Typically, these are political rights, which protect the democratic process. The second group is associated with the parts of the Constitution that establish an independent judiciary. These protect the fairness of the judicial process and the rule of law. As with the express rights, these rights are also conceived as limits on what the Commonwealth can do, rather than as free-standing rights that people hold against government. As with the express rights also, because these rights are implied from the provisions of the Constitution setting up the institutions of Commonwealth government, their principal effect is on Commonwealth power, although the High Court has held in a series of cases that some of them have an impact on State power as well.

The key constitutional provisions from which political rights are drawn are those that establish the House of Representatives and the Senate. The most important is section 24, which provides that Members of the House of Representatives must be ‘directly chosen by the people’ and that the number of Members chosen for each State must be in proportion to the number of people in each State. This section, and its companion that deals with elections to the Senate, clearly requires Australia to have an elected Parliament. Other sections of the Constitution provide that elections must take place every three years and, effectively, require the government to be drawn from the majority in Parliament. On this basis, the system of government put in place by the Australian

Constitution is one in which the government is responsible to the Parliament, which in turn is elected by the Australian people every three years.

The Constitution says nothing else about the political rights that accompany such a system. But the system cannot work without some minimal political rights. In a series of cases over more than 30 years, some of these have been implied by the High Court from these parts of the Constitution. It is established that the Constitution protects ‘freedom of political communication’ or, in other words, the right of Australians to communicate freely with each other and with their elected representatives about political and public affairs. In the litigation that followed the decision of the Parliament to remove the voting rights of all prisoners the Court held that the Constitution provided some protection for the right to vote, at least to the extent of limiting the power of the Parliament to remove voting rights arbitrarily. And other cases suggest that electoral boundaries must be fairly drawn, so as to respect the weight of everyone’s vote, in order to fulfil the constitutional requirement for the Parliament to be ‘chosen by the people’. These decisions prompted the Parliament to confer power to draw electoral boundaries on an independent Electoral Commission, so as to ensure that the standards imposed by the Constitution are regularly met.

The second group of implied rights is drawn from the part of the Constitution that establishes the system of federal courts. Chapter III of the Constitution separates the federal judiciary from the other branches of government, to enable it to operate independently of them. Independence is important, in order to ensure that disputes are determined impartially, according to law, even when the government is a party. In addition, it is important that people understand that the courts are impartial, so that parties accept that judicial decisions are fair, even when a case is decided against them.

As with political rights, the Australian Constitution does not provide any express protection for the judicial process in

the interests of ensuring that the arrangements for the judiciary work effectively. But as with political rights also, the High Court has held that there are limits on the extent to which the government and Parliament can interfere with the courts. These are designed to protect the integrity of the role that the judiciary plays in the Australian constitutional system. Thus the separation of judicial power requires that, generally, courts are open and judicial procedures are fair. It precludes the conferral, even on State courts, of functions that are ‘incompatible’ with the judicial process. It limits the power of the Parliament to withdraw power from the judiciary to decide whether government officials have acted according to law. It may even provide some protection for Australian citizens from arbitrary imprisonment, although the extent to which it does so is far from clear. Nevertheless, on any view, this part of the Constitution provides some protection for due process and the rule of law and may have implications for liberty as well.

### **How do Institutions Protect Rights?**

Important although they may be, the range of rights protected expressly or by implication in the Constitution is small. This is because, as noted earlier, Australia relies on institutions for rights protection. Three institutions are relevant for this purpose: the Parliaments and governments of both the Commonwealth and the States; the courts; and the division of power between the Commonwealth and the States for the purpose of federalism. This part examines how these institutions contribute to rights protection and what can reasonably be expected of them. Each is considered in turn.

The Parliament and government are linked in the relationship known as ‘responsible government’, which was described earlier. For this reason, we consider them together. These are powerful institutions, which control the law-making process. Potentially, they protect rights in two ways: positively, by passing laws to protect rights that are not currently protected and negatively, by restraining themselves from making laws to

infringe rights that are recognised by the common law or international law.

Positive rights protection is more straightforward. The argument here is that when the government and Parliament see the need for better protection of rights generally, or of particular rights, they can enact legislation to do so. This happens from time to time. All States have anti-discrimination legislation. The Commonwealth Parliament has passed legislation to give legal effect within Australia to particular international human rights treaties dealing with, for example, racial discrimination. Both the Commonwealth and the States have established bodies to monitor compliance with rights: the Commonwealth's Human Rights Commission is an example. Emerging rights, such as privacy, have been recognised in legislation. All of this legislation is significant in the Australian context. On the other hand, this legislation has no higher status than any other law. The Parliament can amend it if it thinks fit. In the relatively short period since it was enacted in 1975, for example, the *Racial Discrimination Act* has been modified three times.

Analysis of the effectiveness of Parliament and government in negative rights protection is more complicated. At a theoretical level, it is often assumed that a representative body such as a Parliament will not injure the people that it represents by infringing their rights. And there are practical, common sense reasons that suggest that this assumption might be correct. Members of Parliament, who face regular election, are likely to be reluctant to pass legislation to which voters object sufficiently strongly to cause them to change their vote. For the same reason a government, which relies on the support of a majority in the Parliament, is unlikely to introduce such legislation. If a government nevertheless acts to infringe rights, these same practical considerations suggest that the majority in Parliament will act to restrain it, if not in the open forum of Parliament, then at least in the party room. And if these mechanisms fail, the assumption is that the Opposition will publicly expose rights infringements, causing the government either to

change its mind or to risk losing the election. In Australia, this line of thought is reinforced by the fact that there is a powerful second House of Parliament in the Commonwealth and all States except Queensland in which the government may not have a majority, giving Parliament a more powerful voice. It is reinforced further by the frequency of elections, which for the Commonwealth Parliament are still held every three years.

Clearly, these arrangements are significant for rights protection. But they have weaknesses as well. Most obviously, members of the governing party in a Parliament, who rely on the support of a majority of voters, have less of an incentive to be concerned about the rights of minorities, especially if the minorities are small or politically weak and their cause is unpopular. Indigenous Australians, some immigrant groups, refugee applicants and prisoners are examples of minorities of this kind. Indeed, infringing the rights of these groups may even enhance the popularity of a government with a majority of voters. Even as far as the majority is concerned, moreover, the system is not necessarily reliable. As the examples given earlier suggest, rights infringement may be inadvertent. A government's poor record on rights may be outweighed by other considerations, including its economic credentials or the weakness of the claim of the Opposition as the alternative government, so that its chances of re-election are not affected. In the absence of what sometimes is described as a 'rights culture' government, public servants and Members of Parliament may not consider rights, or give adequate priority to them, in developing new policies. For the same reason, they are likely to be less adept at adapting policies to try to minimise their impact on rights.

The Australian system further assumes that rights also are protected by independent courts, applying the principles and following the procedures of the common law. This assumption has some force as well. Australia is fortunate in the independence of its courts and the quality of its judiciary. Over the centuries of its development, the common law legal system

Australia inherited on British settlement has recognised certain rights, which it has prioritised in further developing the common law and in statutory interpretation. These rights include, for example, freedom of speech and assembly, property, liberty and due process. More recently, the techniques of courts administering the common law have expanded to provide some protection for the wider range of rights that is recognised in international law.

Recent cases demonstrate that Australian courts have some effect on rights protection in the course of adjudication. In *Dietrich*, for example, in dealing with a person accused of a serious offence who had no legal representation at his trial the High Court held that such trials should not proceed unless the judge was satisfied that the trial would be fair. In *Evans*, the Court held that a regulation that made it an offence to 'cause annoyance to participants' during World Youth Day was invalid. It did so by reading down the legislation that authorised the regulation to be made so as to protect freedom of speech.

On the other hand, the courts also have weaknesses from the standpoint of effective rights protection. The rights recognised by the common law are by no means comprehensive: the common law was weak on conceptions of equality rights, for example. While the range of rights has been notionally broadened by international law, there is ongoing debate in Australia about whether and to what extent international law can legitimately be taken into account by courts in developing the common law and interpreting statutes. In the absence of constitutional protection, moreover, Parliament can override rights that are recognised by the common law or by international law, if it wishes to do so. While the courts have techniques that enable them to read legislation down unless it expresses a very clear intention to override rights there are limits to how far they can go in this regard. And so in *Al-Kateb*, in dealing with the validity of the indefinite detention of an applicant for refugee status, one judge who thought that the legislation in question could not be interpreted so as to protect

the liberty of the applicant observed that ‘It is an enduring — and many would say a just — criticism of Australia that it is now one of the few countries in the Western world that does not have a Bill of Rights. But, desirable as a Bill of Rights may be, it is not to be inserted into our Constitution by judicial decisions ...’<sup>1</sup>

The final institution on which Australia relies for rights protection is federalism. The argument here is that rights derive some protection from the effects of the federal division of power between the Commonwealth and the States, thus limiting what either sphere of government can do. While this arrangement is something of a blunt instrument from the standpoint of rights, it is possible to point to examples where it has had rights-protecting effect. In the 1950s, for example, an attempt by the Commonwealth Parliament to dissolve the Communist Party of Australia was held by the High Court to be invalid, on the ground that the power allocated to the commonwealth under the federal division of power did not enable it to enact legislation of this kind. Conversely, in the 1990s, Tasmanian legislation that criminalised homosexual conduct was effectively nullified when the Commonwealth passed legislation under the external affairs power to provide that such conduct was lawful.

As with the other institutional mechanisms, this one has its weaknesses as well. The example of Queensland in the 1970s shows that State Parliaments have ample power to restrict civil liberties in their State if they choose to do so; that they will not necessarily be restrained by considerations of voter backlash; and that the Commonwealth will not always be willing and able to enact overriding legislation. Equally, under the Australian Constitution, it is possible for governments to pool their power, so as to be able to achieve any policy goal, notwithstanding its impact on rights. The legislation to dissolve the Communist Party would have been valid had the States referred additional power to the Commonwealth. And the States are sometimes willing to do this. In recent years, for

example, Commonwealth anti-terrorism legislation that severely restricted the liberties of Australians who came under suspicion was backed up by references from the States.

### **Earlier Attempts to Change Constitution to Protect Rights**

The Constitution can only be changed by referendum or, in other words, by a popular vote. A change is originated by the Commonwealth Parliament, which therefore decides whether and how change is required. Under section 128 of the Constitution, however, a change needs to be approved by a national majority and a majority of voters in a majority of states, or, in other words, in at least four of the six States. Only 8 proposals have been approved at referendum in this way in the more than 100 years since the Constitution came into effect. One of these was in 1967, when Australians approved a proposal to remove certain discriminatory references to Aboriginal people from the Constitution. Another change that was approved gave power to the Commonwealth to administer certain benefits, which now include, for example, Youth Allowance.

Some failed referendums have been concerned with rights. In 1944 a referendum to deal with post-war reconstruction would have provided some constitutional protection for freedom of speech and extended the guarantee of freedom of religion against action by the States. In 1988 a group of referendum proposals would have tightened the protection for trial by jury, extended the guarantees for trial by jury, religious freedom and property to protect against State action and included constitutional guarantees for fair electoral boundaries. All of these proposals were rejected by national majorities. It is sometimes suggested, for this reason, that Australians have already considered, and rejected, the idea of a constitutional bill of rights. This is not correct, however. In both 1944 and 1988 only a very narrow range of rights proposals were put to referendum, as part of a much larger package of proposals. It may be that Australians would reject a proposal for a constitutional bill

of rights. Equally, however, they may not. In any event, they have not yet done so.

### **Constitutional Protection of Rights Elsewhere**

There are other countries in the same constitutional tradition as Australia, which once shared the same concern that constitutional protection of rights would diminish the authority of elected Parliaments to too great a degree. All of these, nevertheless, have found ways of providing better protection for rights that still enable Parliaments to have the last word. Three such countries are considered here and in the next part: Canada, New Zealand and the United Kingdom. Of these three, Canada is the most similar to Australia, in the sense that it is a federation and has a written Constitution that is difficult to change.

In the 1960s, Canada experimented with a legislative bill of rights, which was widely considered to be ineffective. In 1982, it opted to go further, by adopting a Charter of Rights and Freedoms with constitutional status. The rights and freedoms set out in the Charter broadly equate to the core list of civil and political rights, supplemented by additional guarantees for language rights, which are important in the Canadian context. Charter rights are not absolute; a law can impose whatever ‘reasonable limits ... can be demonstrably justified in a free and democratic society’. Charter rights bind both the national and the provincial levels of government. Because the Charter has constitutional status, legislation that is inconsistent with any of the rights in it can be held to be invalid by a court.

To preserve the final authority of the national and provincial Parliaments, however, the Charter incorporates what at the time was a novel mechanism. It provides that legislation of any Parliament can specifically override most Charter rights, for a period of up to five years. Democratic, mobility and language rights are not subject to the override provision. An override can be renewed at the end of the five-year period if the enacting Parliament so wishes. In this way, while the final, formal authority of Parliament is maintained, the Charter requires any

Parliament that proposes to infringe Charter rights to take a public, deliberated decision to do so.

Critics argue that the override mechanism does not strike an appropriate balance between rights protection and the authority of Parliaments because Parliaments are unwilling to override rights in these circumstances. And it is true that in Canada the override has hardly been used at all. That would not necessarily be the result in the different Australian political culture. In any event, it must be possible to tweak this approach so as to ensure that an appropriate level of immediate and public accountability is required of elected representatives for decisions that erode protected rights.

### **Legislative Bills of Rights**

New Zealand and the United Kingdom do not have formal, written Constitutions. When these two countries decided to enhance their levels of rights protection, they experimented with ways of doing so through ordinary legislation: the *Bill of Rights Act 1990* (NZ) and the *Human Rights Act 1998* (UK). Ordinary legislation provides relatively weak rights protection, because other legislation can be enacted that is inconsistent with it. On the other hand, for this very reason, it preserves the supremacy of Parliament intact.

There are several innovative features of these instruments, however, which strengthen their rights protecting effect. Both require government bodies to act consistently with the protected rights, unless legislation clearly authorises them not to do so. Both require courts to interpret legislation so as to comply with protected rights if possible: there are some differences between the New Zealand and United Kingdom legislation in this regard, but they are not important for present purposes. And while neither can be used to invalidate inconsistent legislation, the *United Kingdom Act* authorises courts to make a declaration that an Act of Parliament is incompatible with a protected right. A declaration does not affect the validity of the Act (and so does not help the applicant in the case). But it draws the attention of the government and the parliament to

the problem, encouraging them to change the offending legislation. Like the Canadian Charter, therefore, this mechanism also works by requiring elected representatives to consider the impact of their decisions on rights and to take public and political responsibility for decisions to infringe them.

This dimension of the legislative approach to rights protection is strengthened by another requirement in both countries. While again the provisions differ to a degree, the general idea is that a member of the government must make a statement to the parliament about whether proposed legislation is consistent with the protected rights when each new bill is going through the parliament. This procedure, in turn, encourages parliaments to establish committees to examine proposed legislation for themselves, in the light of statements by the government.

### **Legislative Bills of Rights in Australia**

Inspired by the idea that ordinary legislation could be used to provide reasonably effective protection for rights, the Australian Capital Territory and Victoria have recently enacted rights-protecting legislation: the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act* (2006). Both Acts broadly follow the earlier models in New Zealand and the United Kingdom. They are ordinary statutes, without constitutional status. They protect a wide range of rights, drawn from international human rights instruments to which Australia is a party: principally, the International Covenant on Civil and Political Rights. The legislation requires public authorities to comply with the protected rights; authorises the courts to interpret legislation so that it is consistent with the protected rights if it is reasonably possible to do so; and requires the government to inform the parliament about whether proposed legislation complies with the rights standards or not. Both Acts also authorise courts, in dealing with legislation that cannot be interpreted to comply with the protected rights, to make a declaration to that effect. Such a declaration does not, however, affect the validity of the legislation.

In some respects, the design of these rights-protecting Acts is even more cautious than that of the United Kingdom and New Zealand. The Victorian Charter, for example, also recognises a procedure whereby the parliament can enact legislation that overrides the protected rights for a period of five years, thus combining elements of the Canadian constitutional model with the model for legislative rights protection developed in the United Kingdom and New Zealand. Nevertheless, given the angst about rights protection in Australia, it is an achievement to have enacted these measures at all. Other States have also conducted inquiries into whether to adopt a legislative bill of rights. Some have supported the idea and others have opposed it. None has yet taken action.

In part this is because further developments at the State level were put on hold, pending a decision about national rights protection. In late 2008, the Commonwealth Government launched a 'National Consultation' to consider how human rights should be protected in Australia. Somewhat oddly the Committee established to conduct the consultation was asked to identify options for rights protection that would 'preserve the sovereignty of Parliament'. The qualification is odd, because the Commonwealth Parliament is bound by the Constitution and so is not sovereign in any event. Nevertheless, the terms of reference made it clear that the Committee was not to consider protecting rights through the Constitution.

The Committee reported on 30 September 2009. Its report, which is still under consideration by the government, identified a range of measures for protecting rights, including a cautious proposal for a legislative bill of rights. Both the Committee's report and the debate that preceded it highlighted the difficulty of implementing a legislative bill of rights, along lines developed for countries without a Constitution, in a country like Australia, which has a Constitution, with which a legislative bill of rights must comply. One of several important constitutional constraints on a national legislative bill of rights, for example, is the federal system. If a Commonwealth legisla-

tive bill of rights applied to the States it would affect the supremacy of State Parliaments, thus defeating the logic of using a legislative model in the first place and negating the carefully crafted balance between parliaments and courts achieved by the legislative instruments in Victoria and the ACT. Accordingly, the National Consultation proposed that a national legislative bill of rights apply only to Commonwealth authorities. This solution has its own difficulties, however; not the least of which is that rights protection will be patchy in States that decide not to have a legislative bill of rights of their own.

### **What Next?**

It remains to be seen what the government decides to do in response to the report of the National Consultation. It also remains to be seen whether and how quickly any decision that is made is and can be implemented.

Essentially, the principal choice lies between accepting, or rejecting, the proposal for legislative protection of rights. Neither option is perfect. For constitutional reasons, any legislative bill of rights implemented at the Commonwealth level is likely to be weak, patchy and complicated. Failure to take action at all, however, leaves the problem of rights protection unresolved. In the short term, this would be likely to be justified on the basis that existing institutional arrangements adequately protect rights. But this is the old debate. Important as these institutional arrangements are, the flaws in their operation for the purposes of rights protection are too well-known to put the issue on hold for long.

The reality is that in a country like Australia, constitutional protection of rights, along Canadian lines, would be a more appropriate model. As the Canadian Charter shows, the text of a constitutional Charter can be crisp and simple; it can apply equally to both levels of government; and it can provide procedures that enable the will of Parliament to prevail. Any proposal for a constitutional charter in Australia, however, would encounter the familiar concern about the effect of giving more authority to courts and taking it away from governments and

parliaments. It would need to garner broad-based support, in order to meet the referendum hurdle for constitutional change.

Whatever the response to the National Consultation, debate on constitutional protection of rights is likely to continue. Difficult although it is, it would be useful to break away from the old arguments and entrenched positions and look to the future. The critical question is: how should an increasingly diverse Australia, operating in an interconnected world, protect the human rights of its people? Constitutional protection is not necessarily the only answer to this question, but it is a possible answer, which should not be ruled out.

### Endnote

- 1 *Al-Kateb v Godwin* (2004) 219 CLR 562, [73], McHugh J



**Cheryl Saunders** is a laureate professor, holds a personal chair in law and is Director of the Centre for Comparative Constitutional Studies at The University of Melbourne. She is President Emeritus of the International Association of Constitutional Law and a former President of the Administrative Review Council of Australia and Deputy Chair of the Australian Constitutional Centenary Foundation.