

THE ENVIRONMENT: HOW DOES THE LAW CONTRIBUTE TO ITS PROTECTION AND WHAT MORE CAN BE DONE?

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INTRODUCTION

The law has adopted and created many different ways to achieve environmental protection and improve environmental performance. Varied environmental protection mechanisms have evolved from the 1800s when reserving land was the most common form of environmental legal protection, to today where environmental assessments, tradable permits, and financial incentives are some of the newer forms of environmental protection measures. The evolution of environmental laws has generally corresponded with a refining of our collective environmental concern and our environmental values.

Today, however, our environmental values and concerns are not entirely reflected in our environmental laws, particularly on big issues like climate change, water, and biological diversity. More needs to be done.

HISTORICAL PERSPECTIVES ON THE LAW AND ENVIRONMENTAL PROTECTION IN AUSTRALIA

Environmental laws before federation: a national park and mining in Sydney

The law has regulated and sought to preserve the environment for longer than it is ordinarily credited. Since at least the 1800s the courts have created, upheld, and applied principles allowing landowners suffering from pollution or offensive annoyance to seek redress from those that caused the damage.ⁱ

In the 1860s and 1870s in Australia, statutory lawsⁱⁱ were used to preserve lands from development and intensive uses and to create our first national park, Royal National Park, south of Sydney.ⁱⁱⁱ Shortly after this time, property and minerals laws were used to delay, halt, and then permit coal mining on the shores of Sydney Harbour.^{iv}

The nature of the laws that existed in the 1800s, and the way the laws affected people and their surroundings, largely reflected the community concerns and values about

land, development, and environment at the time. The courts' focus in allowing people to receive compensation for damage caused to land was on protecting the rights of landowners. A desire to preserve an area close to Sydney for recreation for city residents was the principal motivation for parliaments to make parkland laws and create Royal National Park. Laws intended to keep coastal lands in public control restricted Sydney Harbour coal mining. However, these laws were in conflict with other laws designed by the New South Wales Parliament to promote private property ownership and development of land^v. Ultimately, the pro-development values and laws prevailed.

STUDENT ACTIVITIES

1. Identify THREE environmental issues that could benefit from greater legal protection.
2. Identify TWO examples of environmental protection in 19th Century Sydney.
3. The above examples of environmental protection laws provided remedies that served human needs (anthrocentric) rather than the needs of the environment itself (ecocentric). Explain why this tended to be ineffective.

Laws and environmental concerns and values

By looking at the laws of a certain time the dominant environmental concerns and values of Australians of that time can be deduced. Figure 1 charts some changes in values and laws from the 1800s to today.

A rise in environmental values and dedicated environmental laws

The 1970s witnessed the first international expressions of concern for the well-being of the planet. The 1972 *Stockholm Declaration on the Human Environment*^{vi} articulated an agenda for conservation and protection from pollution consistent with human progress and development, and the *World Heritage Convention*^{vii} of the same year created a framework for the conservation of cultural and natural

areas of global significance. This international articulation of environmental concern occurred at the same time as changing ideals and values about the environment in Australia. These changing ideals were demonstrated by opposition to and protests against the damming of Lake Pedder in Tasmania, and the series of green bans in Sydney, where unionists went on strike or refused to do certain work in order to protect parklands, native vegetation, and historic buildings and areas.^{viii} It is generally considered that the 1960s and 1970s marked a change in people's views about the environment and industry. Distrust of industry and fear of pollution increased^{ix} and the environment began to be seen more widely as not only available for human use and pleasure but also as something that should be protected for its own sake^x.

Figure 1: A brief history of environmental laws and environmental values in Australia

Period	Characteristic laws	Dominant values and concerns
Mid 1800s	Private land ownership laws Land reservation laws Mining laws and forestry laws	Development, agriculture, recreation and preservation of public land.
Early 1900s	Town planning laws	Coping with enlarging cities, a post-industrialised ideal of and concern for orderly, safe, and modern urban areas.
1920s	Soil and erosion laws Pest laws	Protection of agriculture and prosperity of rural land.
1950s	Resource exploitation and management laws Environmental health laws	Post-industrialised boom times, concern for family health.
1960s–1970s	Environmental protection laws Nature conservation laws Environmental assessment laws	International environmental concern, pollution, concern for species and nature, concern for cultural heritage.
1990s–2000s	Stronger environmental assessment laws Laws dealing with global environmental problems (ozone, climate change, biodiversity) Polluter pays legislation	Ecological sustainable development, precaution, concern for future generations, dealing with global environmental problems, making the polluter pay.

In the 1960s and the 1970s in Australia many new environmental laws were introduced.^{xi} Some of them updated or replaced earlier efforts to preserve aspects of the environment, but all responded to the international shift in environmental concerns of the time. The aims of these new laws included to regulate and prohibit pollution, to preserve heritage and native environments,

and to assess proposed developments considered likely to damage the environment. In the same period the courts controversially confirmed the power of the Commonwealth Parliament to veto development approvals on the grounds that they would harm the environment even though the Commonwealth Parliament did not, and still does not, have an express power to make laws on environmental matters.^{xii}

STUDENT ACTIVITIES

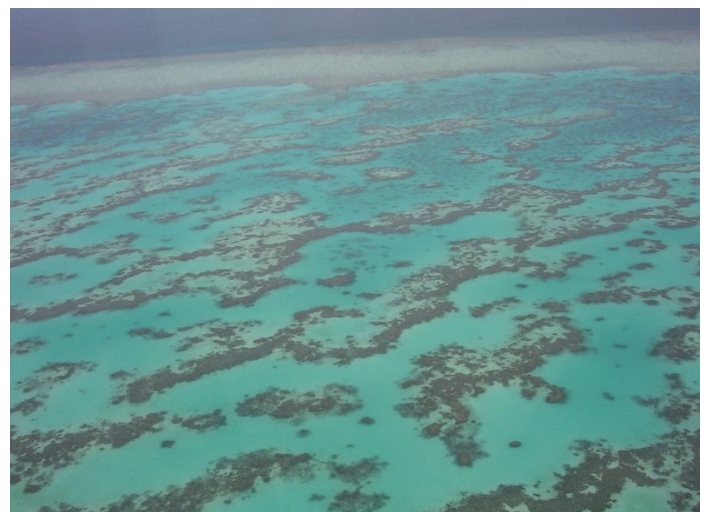
- Use Figure 1 to suggest when anthropocentric views of the environment began to give way to ecocentric values. Suggest reasons for your response.
- Identify the first 'international expression of concern' for environmental protection.
- Identify ONE international law created in the same year.
- Investigate and provide ONE case study of GREEN BANS (see figure 4 and try <www.abc.net.au/rn/science/earth/stories/s18145.htm>).
- Can you detect a sentence in the above section that distinguishes the anthropocentric from the ecocentric views of the environment?
- Use reference xi to identify an environmental law that may have been introduced in your state.
- INVESTIGATE the case *Murphyores Incorporated v The Commonwealth* (1976) 136 CLR 1 to explain the complexity of providing legal protection to the environment within a Federal system.

RECENT PERSPECTIVES ON ENVIRONMENTAL LAW

Recasting environmental laws

Since the early 1990s Australia's environmental laws have been recast in light of international environmental law concepts. These concepts include ecologically sustainable development, precaution, and fairness between generations. The structure and framework of laws in Australia have not changed greatly but the governments that implement the laws and the judges that ensure compliance with them have been required to reinterpret and apply the laws in a way that is supposed to ensure the ongoing welfare of humans and the broader environment.

Figure 2: Great Barrier Reef



Source: http://commons.wikimedia.org/wiki/Image:Part_of_Great_Barrier_Reef_from_Helicopter.JPG

In some respects this has occurred. For example, more land and marine areas have been preserved from further use and development under protected areas laws. This has included the creation of marine parks, establishing new and enlarging existing national parks in most Australian states and territories, protecting remote rivers in Queensland, and increasing the heritage status of iconic buildings, including the Sydney Opera House and the Melbourne Exhibition Building. Degrading activities in highly valued places have been halted or restricted using traditional regulatory tools. For example, forestry activities in some of Australia's oldest forests have been limited, land clearing in Queensland has been constrained, cattle grazing in the Alpine National Park has been banned, and fishing in some parts of the Great Barrier Reef has been prohibited.

A number of courts and tribunals have also responded to the stronger environmental objectives in laws by overturning government decisions on the grounds that important principles about ecological sustainable development, precaution and climate change have not been taken into account. Most notably, state and federal courts have required governments to assess climate change impacts of proposed developments when the governments had excluded such impacts from their deliberations^{xiii} Earlier in the 1990s, the New South Wales Land and Environment Court ensured that the precautionary principle, the notion that it is preferable to delay development while consequences to the environment are uncertain, was considered by decision-makers where their decisions affect the environment.^{xiv}

STUDENT ACTIVITIES

11. Use Figure 4 to define the following terms: environmentally sustainable development; precautionary principle; and intergenerational equity.
12. Identify FIVE examples of the influence of international environmental law on domestic issues.
13. Explain the influence of court interpretation of international environmental law on the actions of state and federal governments.
14. Investigate *Leatch v National Parks and Wildlife Service & Shoalhaven City Council* (1993) 81 LGERA as an example of the precautionary principle. Discuss your findings.

New mechanisms for environmental protection

Ways of achieving environmental improvements have also changed as parliaments have looked for different and varied mechanisms to achieve their goals and meet society's environmental values.

Voluntary plans and projects have been developed to help businesses achieve environmental performance beyond that required by the law. The principle that a polluter should pay for any pollution it causes has been applied, including through the implementation of laws like the Western Australian *Contaminated Sites Act 2003*, which prevent a polluter of land from walking away from the mess they created. Further, the principle that a person who removes habitat be required to offset that removal by replanting or rehabilitating a habitat within the region has been required under Victoria's native vegetation management framework.^{xv} New forms of penalties to make it easier for environmental protection agencies to punish polluters with fines have also been incorporated into South Australian and Commonwealth laws.^{xvi}

Taxes, financial incentives, and tradable credits have been used and nominated as ways of realising improved environmental performance, particularly to reduce greenhouse gas emissions in a way that would cause least disruption to business and the economy.

STUDENT ACTIVITIES

15. Outline efforts made by the Victorian Government to require polluters to pay for their pollution.
16. Identify ONE example of penalties which may be imposed on those who damage the environment.
17. Identify THREE examples of incentives that may dissuade individuals and firms from damaging the environment.

HOW THE LAW PROTECTS THE ENVIRONMENT

From the discussion above on the way the law has protected the environment in the distant and recent past, it is apparent that the law can be used in many ways to pursue environmental protection: whether that protection is a by-product of protecting property rights, establishing areas for human recreation, protecting human health, or for preserving species and habitat for the sake of their ongoing existence. Ten of those ways are shown in Figure 3.

Figure 3: Ten ways the law contributes to the protection of the environment

1. Preserving land and water areas from development and degrading uses.
2. Allowing property owners to seek redress for damage caused to their interests.
3. Nominating important species, habitat or places, and preventing activities that will significantly affect those preserved aspects of the environment.
4. Prohibiting, limiting or regulating certain polluting conduct.
5. Mandating assessment of proposals that are considered likely to affect the environment.
6. Requiring rehabilitation of contaminated sites.
7. Requiring offsetting, or restoration of degraded or removed habitats.
8. Offering financial incentives for business and individuals to adopt technology or take action that reduces environmentally deleterious behaviour.
9. Setting emission standards for machinery and business.
10. Regulating and setting out management requirements for certain industries like mining, forestry, and electricity generation.

STUDENT ACTIVITIES

18. Identify FIVE ways in which the law contributes to the protection of the environment (linking one or more to issues you have studied).
19. Construct a cloze passage using the information in Figure 3. Test it on someone.

WHAT MORE CAN BE DONE?

Bridging the divide between the law and our values and concerns

There is currently a division between the community's values and concerns about the environment and the

laws aimed at protecting the environment. This is most clear in the three areas of *climate change*, *water*, and *species protection*. In these areas it cannot be said that the law has protected the ongoing welfare of humans and the broader environment. Our greenhouse gas emissions continue to rise and modelling continues to show a future changed climate, water is increasingly scarce, and habitats and species continue to disappear.

However, people want parliaments and governments to take greater responsive action in these areas. A recent report by the Climate Institute found that 78 per cent of Australians believe that the country needs to take further urgent action to deal with climate change.^{xvii} These areas are, at least, on the political radar. Water, especially the plight of the Murray-Darling Basin, has been the subject of extensive media attention and intergovernmental efforts to co-ordinate a national response to the issue of water rights. The Commonwealth Government has promised a carbon trading system aimed at reducing Australia's total greenhouse gas emissions, and the Victorian Government has just initiated a review^{xviii} of land and biodiversity policies and laws.

Using the current framework and tools for environmental protection

It is possible that the many current legal and non-legal mechanisms can be used to deal with the three areas nominated for further attention. Responses to climate change could include tightening emissions standards, prohibiting further polluting industry, and requiring polluters to pay for their emissions, perhaps through the purchase of tradable rights. Water could be shared more equitably by offering incentives for users to give up their current rights, by increasing licensing requirements and requiring more environmental assessments of proposed water using activities. Biological diversity could be better preserved by reserving more areas of land and water, restricting land clearing, imposing limits on harvesting of fish and forest species, and prohibiting activities in important habitats, not just in national parks.

It is obvious, however, that voluntary measures, encouragement and financial incentives, which had been the favoured mechanisms by Australia's previous government, will not change our behaviour enough to make sure we reduce our greenhouse gas emissions, share our available water fairly, and ensure that non-human species have a future.

Stronger application of the existing laws

In some respects the existing statute law could be used to achieve greater environmental protection. For instance, rather than warning polluters, environmental protection agencies could use their powers to prosecute offences under pollution control laws and require rehabilitation of contaminated land in a way they have been reluctant to do. The handling of the Shell Refinery, which has been exposed in the media as a repeat offender of environmental laws, but not prosecuted by the Victorian Environment Protection Authority, is an example of this reluctance.

The Commonwealth's *Environment Protection and Biodiversity Conservation Act 1999* could be interpreted and enforced more robustly than now. Projects assessed under that law

invariably are permitted notwithstanding that they might have an adverse consequence on the environment. Many smaller projects, particularly land clearing, fishing, and water using activities, are not even assessed under the act.

Finally, some of the protection measures for species and habitat in state environmental laws could be used more often and more consistently. The power to make protection orders to prevent activities that might destroy vulnerable species in the *Victorian Flora and Fauna Guarantee Act 1988*, for instance, has rarely, if ever, been used.

Environmental rights

One new way to achieve environmental protection in Australia could be to recognise and protect environmental rights. Already in the Australian Capital Territory and Victoria human rights have been recognised and protected.^{xix} Some of these rights could be used to press for greater environmental protection, particularly rights to information (for example information about pollution levels) and rights to privacy. In Europe a right to privacy has been interpreted to include a right to be protected from excessive noise or pollution.

Laws could also include more specific environmental rights. For instance, Australian laws could adopt environmental rights like those protected by the South African Constitution, which ensure that 'everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected for the benefit of present and future generations...'^{xx} Additionally, rights to water could be included and responsibilities not to degrade the environment imposed. However, these options have not been well received by Australian governments. The Australian Capital Territory, for example, has decided not to include environmental rights in its *Human Rights Act 2004* for the time being because it does not know how such rights might be used.^{xxi}

STUDENT ACTIVITIES

20. Identify THREE ways in which current legal and non-legal mechanisms can be used to deal with each of:
 - a. climate change
 - b. water
 - c. biodiversity.
21. Suggest THREE ways in which governments could more effectively enforce existing statutes.
22. Explain the potential impact of regarding environmental rights as human rights.

CONCLUSION

In Australia, the law generally responds to community attitudes, values and concerns. In the environmental realm this has been evident in judge-made law from the 1800s through to the parliament-made laws of the recent past. The law has developed varied ways of responding to environmental problems, including prohibiting activities, preserving areas, and imposing costs on polluters and degraders of the environment. Today, however, there is a disjuncture between our environmental concerns and values and our environmental laws. Australians want more from their law-makers, particularly in the areas of

climate change, water, and biodiversity protection. The legal framework exists, alternative measures are available, and creating environmental rights could be one way of incorporating our environmental values and concerns in environmental laws.

Figure 4: Important terms and concepts defined

Biological diversity or biodiversity refers to the whole collection and variety of plant and animal species.

Ecological sustainable development or ESD is the concept that development should meet our needs while maintaining the environment so that future generations can meet their development needs.

Precautionary principle is the notion that developments should not proceed, or management techniques should be employed, if there is uncertainty about the consequences of the development on the environment.

Polluter pays principle is the notion that a person who causes pollution should be responsible for paying to clean up, monitor, store, or limit that pollution.

Offsetting is the notion that a degrading activity can be balanced with an environmentally beneficial activity. Planting trees to absorb greenhouse gas emissions is the most common form of offsetting.

Green bans are stop-works and strikes held by workers because they want to highlight environmentally degrading activities or do not want those activities to proceed.

Tradable permits are limited numbers of government issued rights to pollute or to undertake an environmentally degrading activity that can be sold or traded to other polluters or degraders. The idea behind tradable permits is to reduce the number of available permits each year while increasing their cost. In this way polluters are encouraged to find cheaper ways to stop polluting or degrading the environment. Tradable permits are a form of **financial incentive**. Other common **financial incentives** are subsidies and taxes.

Figure 5: Tasmanian Devil



Source: <http://commons.wikimedia.org/wiki/Image:Tasmanian_devil_head_on.jpg>

STUDENT ACTIVITIES

Didn't get all of those terms and concepts in Figure 4?

Well now's your chance ...

23. EXTENSION: investigate and explain the impact of:
 - a. an Emissions Trading System
 - b. Efforts to rehabilitate the Murray Darling Basin
 - c. protection of a species (such as the Tasmanian Devil).
24. EVALUATE ways in which the legal system can protect the Australian environment and include a discussion of climate change, water and biodiversity.

NOTES

- ⁱ The case of *St Helens Smelting Co v Tipping* (1865) 11 ER 1483 is an early case where a landowner was found by the court to be entitled to receive compensation from a neighbour because the neighbour emitted noxious gases from its smelting operation that damaged the landowner's crops and trees and made the landowner's cattle ill.
- ⁱⁱ Statutory laws are those laws made by parliaments. They are distinguished from judge made laws, which are collectively referred to as the common law.
- ⁱⁱⁱ See the Australian Heritage Database entry for Royal National Park and Garawarra State Conservation Area, available online at <<http://www.environment.gov.au/cgi-bin/ahdb/search.pl>>
- ^{iv} Bonyhady, Tim, 2000, *The colonial earth*, Melbourne University Press, Melbourne.
- ^v Bonyhady, Tim, 2000, *The colonial earth*, Melbourne University Press, Melbourne.
- ^{vi} A copy of the Declaration has been reproduced by the Center for Economic and Human Rights and can be viewed online at <<http://cesr.org/node/701>>
- ^{vii} The *Convention concerning the Protection of the World Cultural and Natural Heritage* can be viewed online at <<http://whc.unesco.org/en/conventiontext/>>
- ^{viii} Doyle, Timothy, 2000, *Green power*, UNSW Press, Sydney.
- ^{ix} Lazarus, Richard, 2004, *The making of environmental law*. The University of Chicago Press, Chicago and London.
- ^x Stone, Christopher, 1996, *Should trees have standing?: and other essays on law, morals, and the environment*, Oceania Publications, New York, 25th Anniversary Edition.
- ^{xi} The 1970 Victorian *Environment Protection Act*, the 1972 South Australian *National Parks and Wildlife Act*, the 1976 Western Australian *Waterways Conservation Act* and the 1979 twin New South Wales laws: the *Land and Environment Court Act* and the *Environmental Planning and Assessment Act* are examples of laws introduced in the 1970s that still exist today.
- ^{xii} *Murphyores Incorporated v the Commonwealth* (1976) 136 CLR 1.
- ^{xiii} See Bonyhady and Christoff (eds), 2008, *Climate Law in Australia*. The Federation Press, Sydney.
- ^{xiv} In *Leach v National Parks & Wildlife Service & Shoalhaven City Council* (1993) 81 LGERA 270; the judge overturned a decision of the government to permit a road because there was insufficient scientific certainty about the effects of the road on wildlife. An application of the precautionary principle dictated that the proposal be rejected.
- ^{xv} State of Victoria, 2002, *Native Vegetation Management – A Framework for Action*.
- ^{xvi} The law firm Freehills has published a useful summary on civil penalties in environmental law on its web site at <http://www.freehills.com.au/publications/publications_5031.asp> titled: *Civil penalties: the future tool of environmental protection?*.
- ^{xvii} Climate Institute, 2008, *Climate of the Nation: Australian attitudes to climate change and its solutions*, April 2008.
- ^{xviii} Victorian Government, 2008, *Land and biodiversity at a time of climate change*: Green Paper. April 2008.
- ^{xix} The Australian Capital Territory *Human Rights Act 2004* and the Victorian *Charter of Human Rights and Responsibilities Act 2006*. Tasmania and Western Australia have also started to consider similar laws.
- ^{xx} South African Constitution, Chapter 2 Bill of Rights, section 24.
- ^{xxi} Mr Cobell, Attorney General, *ACT Hansard*, 22 August 2006, 2460.

THINKING ABOUT AN AUSTRALIAN CHARTER OF RIGHTS AND FREEDOMS

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Not long after the present Federal Labor Government was elected the Attorney-General, Mr Robert McClelland announced that he would initiate a public inquiry about how best to recognise and protect the human rights and freedoms of all Australians¹. The central question before this inquiry will be whether or not a statutory charter of rights and freedoms should be enacted by the Commonwealth Parliament. In this article I will summarise some of the principal arguments for and against the introduction of such a Charter and then draw my conclusion.

SOME ARGUMENTS FOR A CHARTER OF RIGHTS AND FREEDOMS FOR AUSTRALIANS

Australia is a signatory to every major international human rights treaty. It is worth listing these. They are:

- *The International Covenant on Civil and Political Rights*
- *The International Covenant on Economic, Social and Cultural Rights*
- *The International Convention on the Elimination of Racial Discrimination*
- *The International Convention on the Elimination of Discrimination against Women*
- *The International Convention against Torture*
- *The International Convention on the Rights of the Child*

These treaties have been ratified by Australian governments of all political complexions. This means that Australia has agreed to implement their provisions into Australian law and to abide by their terms. Despite this, the Commonwealth Parliament has not comprehensively enacted the treaties' provisions. We have a *Sex Discrimination Act*, a *Race Discrimination Act* and a *Disability Discrimination Act* but not much more. Other provisions of the treaties are scattered through legislation but in a partial and ad hoc way. If Australia is serious, therefore, about meeting its international human rights obligations, we should now move to codify the treaty provisions in a federal charter of rights and freedoms. If we don't, then we are not fulfilling the international responsibilities to which we have committed ourselves².

Every country in the Western world has enacted a charter of rights – except Australia. They have done so as signatories to the treaties outlined above. The countries with which we compare ourselves most often, the United Kingdom, Canada and New Zealand, have all adopted such a charter. The United States has its Bill of Rights. Every nation in Europe has a similar law, most in their constitutions. Australia's position, therefore, is most anomalous. If the purpose of a charter is to promote and protect the fundamental human rights of the Australian people, why haven't our governments done so? It is not as if we would be doing anything radical. It has all been done before and successfully.

Recent experience in Australia has demonstrated, regrettably, that existing Australian law does not adequately protect

human rights. So, for example, we have detained asylum-seekers arbitrarily and in terrible conditions. These detainees have included young children. We have failed dismally to ensure that Australia's indigenous peoples enjoy a standard of living equal to that of the Caucasian population. One indicator of this is that Australia's Aboriginal peoples on average live for twenty years less than other Australians do. Australia's anti-terrorism laws breach several human rights standards including, for instance, the incommunicado detention of people not suspected of any offence. This experience suggests that we need overarching legislation to ensure that such infringements do not occur³.

STUDENT ACTIVITIES

1. Identify THREE major international Human Rights Treaties signed by Australia.
2. What do you think the author means by the term 'governments of all political complexions'?
3. Identify THREE Commonwealth acts designed to protect human rights in Australia.
4. Identify THREE nations which already have a charter of human rights.

SOME ARGUMENTS AGAINST A CHARTER

The case for a charter sounds fine in the abstract but in practice its enactment would have a number of detrimental consequences. Perhaps the main one is that by having a Charter embedded in legislation or the Constitution, power would be taken away from our elected representatives in parliament and given to the courts. Judges, of course, are not elected. Our parliamentarians are. So, it would be very difficult to hold judges to account for decisions that they made about which rights we have and which we do not. However, if our parliamentarians make any such mistakes, we can replace them at the next election. So, there is a sense in which a charter might undermine our democratic system. Not only that but judges, generally speaking, come from a very privileged background. They tend not have a broad experience of life. Parliamentarians, however, come from all walks of life and for that reason are better placed to make decisions on how Australians' human rights are best protected⁴.

Enacting a charter would be a lawyer's picnic. The rights contained in a Charter are cast very generally and may be applied in a large and diverse array of situations. So, one can reasonably expect that lawyer's will seek to make charter related arguments in every case they possibly can. This will have two principal effects. It will clog up the courts and it will result in lawyer's enriching themselves at the expense of their clients and the rest of the Australian population. The former Premier of NSW, Bob Carr, wrote recently that 'lawyers are already drunk with power'⁵. A charter would give them much more.

In any case, human rights are already well protected in this country. Australia has a proud tradition in the development

of the common law. The common law has acted as a bastion for the protection of human rights for centuries. It does not need supplementation. We also have a fine Constitution. The High Court interprets it in a way that facilitates individuals' civil and political rights. Had Australians wanted to have a charter, they would have enacted one at the time of federation in 1901 when the Constitution came into effect. But they did not. Instead, they placed their faith firmly in the operation of our Westminster system of government and the separation of legislative, executive and judicial power that it embodies⁶.

SORTING OUT THE ARGUMENTS

One of the problems in debating the merits and demerits of a charter is that both sides of that debate make entirely legitimate points. The discussion is not black and white. If a charter is enacted there may be some downsides. And if one is not enacted, there will also be opportunities foregone. What is involved here is a question of balance.

From my point of view, the proper starting point for tackling this vexed controversy is to get a bit more familiar with what a charter of fundamental rights and freedoms actually contains and protects. Here are some of the human rights that would be incorporated into law:

- The right to life, liberty and security of the person.
- The right to freedom from torture and cruel, inhuman or degrading treatment.
- The right to freedom of thought, conscience, religion and belief.
- The right to freedom of speech, freedom of association and freedom of assembly.
- The right to privacy and the protection of family life.
- The right to freedom from arbitrary detention.
- The right to a fair trial.
- The right to vote.

It seems to me that all of these are worth having and protecting. Indeed they represent, in a sense, values to which we, as Australians, should aspire. So the question really is about how best to protect such rights rather than whether we should have them at all.

Then we have to decide whether the existing system of protection is adequate or not. Here, I think the proponents of a charter have the upper hand. First, it is clear that there have been really major, and sometimes shocking infringements of individuals' rights in recent years. Think, for example, of the case of Cornelia Rau, an Australian citizen locked up in an immigration detention centre for months. Or Mohammed Haneef, detained for weeks and interrogated without the normal protections associated with fair criminal procedure. Or Ali Al-Kateb, whom the High Court found could be detained by the government, without trial, for the rest of his life if no other place to deport him could be found⁷.

Secondly, it is clear that the common law could not be utilised to free these people. This demonstrates the common law's major problem in this respect. It can be straightforwardly overridden by statute. Thirdly, Australia has now been the subject of consistent criticism by the Treaty Bodies of the United Nations, the bodies designed to ensure that all nations abide by their international human rights obligations. For more than a decade they have condemned Australia's treatment of people seeking asylum, our Aboriginal population and the breadth of our anti-terrorism laws⁸.

So, on balance, I think that protecting our fundamental human rights, and meeting our international human rights obligations, by codifying these rights in law would be a good

thing. But this is where the arguments of the other side kick in. We need to do so in a way that will not upset the existing balance of power between the government, the parliament and the judiciary. This can be done.

It would be prudent, for that reason, not to insert such a charter into our Constitution. It would be better first to see how it works in legislation.

Next, we could do what the UK Parliament has done and ensure that, while the courts will have a prominent role in interpreting the charter, the final decision on what should happen when a court determines that an act of parliament infringes human rights, should remain with the parliament. So, a court could declare that legislation is incompatible with the human rights contained in the charter. If such a declaration were issued, however, the matter would go back to the parliament. It would then decide whether to amend the law in question. This deals effectively with the argument that too much power would be transferred to the judiciary⁹.

This compromise, or something like it, would give both parliament and the courts an equal share in making decisions about how our human rights should best be protected. And it would reflect the reality that neither side of the charter debate has a monopoly of wisdom on it. Instead we must search for some reasoned equilibrium¹⁰.

STUDENT ACTIVITIES

5. Explain why a statutory charter of rights 'would be a lawyer's picnic'.
6. Identify FOUR human rights that may be incorporated into a charter of human rights.
7. Identify THREE examples of why Australia's existing system of human rights protection may not be considered adequate.
8. Explain why common law can be 'straightforwardly overridden by statute law'.
9. How does the UN feel about the protection of human rights in Australia?
10. Explain why the author believes that a statutory charter of human rights would be more prudent (at least at first) than a constitutional charter of human rights.
11. Explain how greater power could be given to parliament once courts have been called upon to interpret a human rights charter.
12. EXTENSION: debate the pros and cons of a statutory versus a constitutional charter of human rights.

REFERENCES

- ¹ See the recent speech by the Attorney-General, Robert McLelland, delivered to Human Rights Law Resource Centre, Melbourne, 7 August 2008, available at <www.hrlrc.org.au>
- ² For further information regarding Australia's compliance with its international human rights treaty obligations see Spencer Zifcak, *Mr Ruddock Goes to Geneva*, UNSW Press, 2004.
- ³ For a fuller account of Australia's recent human rights record see Julian Burnside's *Watching Brief: Reflections on Human Rights, Law and Justice*, Scribe Publishing, 2008.
- ⁴ This argument has been made recently by Senator George Brandis in speech delivered to the Law Faculty at James Cook University.
- ⁵ Bob Carr, Opinion Piece, *The Australian*, April 24 2008.
- ⁶ See further, Hilary Charlesworth, 'The High Court and Human Rights' in Peter Cane (ed), *Centenary Essays for the High Court of Australia*, Lexis Nexis Butterworths, 2004.
- ⁷ These cases are covered in Julian Burnside's book cited above.
- ⁸ See *Mr Ruddock Goes to Geneva*, above.
- ⁹ This is the model adopted in the *UK Human Rights Act*, 1998 and in Victoria's *Charter of Rights and Responsibilities* 2007. On the latter see Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act*, Lexis Nexis Butterworths, 2008.
- ¹⁰ For a recent splendid summary of the major arguments see Justice Michael Kirby, *The National Debate about a Charter of Rights and Responsibilities: Answering some of the Critics*, Address to the Law Institute of Victoria, 21 August 2008 available at <www.hcourt.gov.au/speeches/kirbyj>

LEGAL SNAPSHOT

by Warwick J Walsh-Buckley
Barrister-at-Law

DEALING WITH DRINK DRIVERS IN AUSTRALIA – DEFENCES TO DRINK-DRIVING OFFENCES

INTRODUCTION

A significant portion of the Australian road toll is due to drink-driving. Economic and personal costs of death and serious injury are high. For over 100 years there has been growing recognition by legislatures and courts of this, especially in Victoria.

DRINK-DRIVING REGULATION

In the early 1900's the *Police Offences Act* (Vic) made it illegal to be in charge of a vehicle while drunk. More specific offences under the *Motor Car Act* 1915 s 20(2) such as driving while under the influence of liquor, were not contingent on actual drunkenness and still exist in the *Road Safety Act* 1986 s 49(1) (a). By the late 20th century there were 'driving while exceeding the prescribed alcohol concentration' offences appearing in ss 49(1) (b),(f) (detected by breath analyzing instruments) and (g) (detected by blood tests).

In Victoria, drink-driving penalties became harsh, depending on the type of offence, blood alcohol level, and whether it was a subsequent offence. Penalties range from mandatory periods of cancellation of licences, fines and prison. Whilst fines and prison are not mandatory and are left to the magistrate's discretion, for licence disqualification there is usually no discretion – a minimum set lengthy period is imposed. If a motorist is caught driving disqualified penalties include prison.

When disqualification expires and the motorist applies for relicensing the magistrate must order (depending on the reading, type of offence, and whether there are previous offences) that the motorist cannot drive any motor vehicle for a lengthy period unless fitted with an alcohol ignition interlock device (at personal expense) preventing the car running unless the motorist blows alcohol free.

DRINK-DRIVING DEFENCES

Considering severe penalties and the need to drive, and the legislation's draconian nature (including evidentiary, facilitative, conclusive proof or reverse onus provisions designed by parliament to make it difficult for the motorist to defend drink-driving charges) some motorists retain experienced barristers to devise legal arguments or strategies to defeat such charges. Recent decisions of Victoria's highest courts indicate the general flavour of defences argued.

Justice Brooking in the Court of Appeal in *Sher v DPP* (2002) 34 *Motor Vehicle Reports* 153 said:

'This is the latest product to come before the court of the thriving minor industry, in which some lawyers seem to find full-time employment, of keeping the streets safe for those who drive when they have had too much to drink. Much time and ingenuity are devoted to this.

We are not at all persuaded that the results of all this activity are in the public interest. Parliament does its best to keep drunk-drivers off the streets. But the *hydra of technicality is a many-headed beast*, and as one unattractive point is cut off another rears up in its place. The courts must do their best too.

Arguments about proof of the effects of drink on an individual's ability to drive properly lead to the creation of blood alcohol concentration offences ... followed by the creation of offences which depend upon the result shown by an instrument. A new jurisprudence develops about ... measuring devices and certificates. Then drivers refuse to have breath tests and this is met by the creation of the offence of refusing to take a breath test. Next the lawyers say that the necessary incantations have not been used, so that there has been no unlawful refusal.'

One reply to *Sher's* case was an editorial 'Individual rights and community interests' appearing in *Victorian Bar News* (2001)

'... For the court to say ... that it is 'not at all persuaded that the results of all this activity are in the public interest ...' appears to misconceive the duty of the lawyer. If the statement means that the taking of untenable technical points involves a major waste of public resources, it is probably a valid criticism. If, however, it means that the successful defence of people on technical grounds is not in the public interest, it is a negation of the principle that a man or woman should not be convicted except according to law. If it means that this particular group of alleged offenders are 'unworthy' of being defended, or if it means that technical defences should not be taken in this area ... (where the offences themselves are highly technical) what does it say of the activities of lawyers who defend persons who have in fact committed murder or rape or who traffic in heroin?'

Another reply was editorial commentary of *Sher's* case in (2002) *Motor Vehicle Reports* :

'The Court of Appeal refers to the 'thriving minor industry' where 'some lawyers' devote 'time and energy' to the 'hydra of technicality' when defending those charged with drink-driving ... It is suggested that this activity is not in the public interest. The activity has been created by the Victorian legislature. The conduct of breath tests should be straightforward ... Instead the ... act ... presented the police and drivers with a complicated, difficult, tortuous and awkward set of legislative provisions ... amended frequently ... the courts have had to devote many hours, resulting in thousands of words, working out what [it] ... means. The combination of verbose legislative provisions resulting in torrents of judicial precedent has created a

formidable branch of the law ... It is not unknown for a few idle police officers to take short cuts in following the prescribed procedure when testing drivers for having an excess level of alcohol ... The instances may be rare ... difficult to prove ... it is incumbent upon a solicitor to check that the correct procedure has been carried out in respect of a particular client. The pressure and momentum creating the thriving minor industry comes from the drivers. Solicitors would [fail] ... their professional duty if they did not check carefully whether there had been a breach of the ordinary rules of criminal procedure or ... specific procedure governing breath tests.'

Justice Smith said after allowing a motorist's review against dismissal of his appeal in *Day v The County Court* (2003) 37 *Motor Vehicle Reports* 319 at [40]:

'... in the ongoing saga of challenges to convictions ... On occasions, judicial interpretation of the act has created results seen as unsatisfactory and which have been addressed by amendments to the legislation. That ... is a price ... paid for the creation of what is

a highly detailed and technical set of very difficult provisions, designed to facilitate the enforcement of the law, and so address the very serious problem of drink driving, by removing and limiting common law rights and protections, including those ... found in the common law rules of evidence. Another price ... paid is the taking of points by counsel for the accused which appear ... technical ...'

CONCLUSION

When certain defences succeed the prosecution sometimes appeals to the Supreme Court for precedent on whether the magistrate correctly dismissed the charge due to alleged technical breach of procedures for proving drink-driving. If the appeal is allowed a binding precedent is set – the so-called defence cannot be successfully argued. If the appeal is dismissed there may be legislative reform to prevent it being argued in future. If no legislation counteracts it police change tactics in future to avoid the 'technical defence'. This is the history of drink-driving regulation.

LEGAL UPDATE

by **Beth Wilson**

Health Services Commissioner, Victoria

JUDICIAL INDEPENDENCE OR DISCRIMINATION?

The appointment of a part-time judge in Victoria has riled the Bar Council. Judge Barbara Cotterell has been appointed to the County Court on a part time basis to assist with 'cleaning up particular lists'. The appointment is part of a plan to unclog the legal system and includes the use of mediation or alternative dispute resolution. This has triggered a very public media row between Rob Hulls the Attorney-General and Peter Riordan the Chair of the Bar Council. Riordan has refused to deliver the traditional chair's welcome speech to Judge Cotterell saying her appointment as a part-time judge jeopardises the independence of the judiciary and 'breaches the established convention that judges should not be subject to the influence of the Government'.

Rob Hulls has branded the Bar as 'disrespectful troglodytes' and called Riordan's actions 'discriminatory' and says he doubts if the Bar Council chair would have behaved as he has if the appointment had been of a male barrister. Hulls has also accused the Bar of 'sour grapes' because Cotterell is not a member of the Bar. Riordan has responded by agreeing that Judge Cotterell is eminently qualified for a judicial position and was a member of the Bar for 35 years. He objects to the terms of her appointment which include a 12 monthly 'activation' by the Attorney-General. The shadow Attorney-General has described the move to appoint part-time judges as 'dangerous policy' (*The Age* 16 and 17 May, 2008). More than twenty years ago the Bar and the judiciary of the Supreme Court were outraged by the appointment of the first non-barrister judge when a solicitor Bernard Teague

became a Supreme Court judge and went on to serve the court excellently for many years.

POLAR BEARS

The United States has listed the polar bear as a threatened species and this is likely to lead to many court battles as companies mining in the Arctic for rich oil deposits try to defend their interests. Some 15 per cent of the oil used in the United States comes from the Arctic and soaring prices have seen the companies venturing further and further into the frozen Arctic. The polar bears have been listed under the United States *Endangered Species Act* primarily because of the threat to their habitat posed by climate change (*The Age* 16/5/2008).

SIGN HERE

Crime Statistics reveal that one in three home burglaries is committed by teenagers. In Victoria one response has been to introduce teenagers' good behaviour contracts. Parents and children would sign the contracts which would spell out a number of behavioural conditions, such as undertaking to respect other people and their property (*Herald-Sun* 19/5/2008) The plan is expected to be piloted before the end of the year.

Court delays have also been criticised as meaning some teenagers are being dealt with and sentenced by adult courts for offences committed when they were under age. This has potentially serious implications for their future as verdicts of adult courts may affect their employment prospects when police checks are carried out by potential employers.

MEDIA WATCH

by Margaret Beazer

STUDENT SUES FOR 'SLAVERY': \$200 FOR 158 HOURS SECURITY WORK

AN INTERNATIONAL student who was paid just \$1.26 an hour for more than 150 hours work as a security guard at the Australian Open tennis is suing several companies for being treated like a 'slave'.

Pakistani student Faisal Durrani, 23, who wants to become a permanent resident, said he was aware of at least another four security guards from the subcontinent who had only received a small payment for their work at the Open.

'I believe there are a lot more,' he said.

It is the latest alleged incident to involve the mistreatment of workers from the subcontinent after the mass taxi driver protest in early May over unsafe work conditions.

Mr Durrani's statement of claim, lodged at the Melbourne Magistrates Court, alleges that he was paid \$200 for the 158 hours he had worked at the Australian Open. 'To me it was an act of slavery, we have been treated like slaves,' he said.

His solicitor, Andrew Weinmann of Maurice Blackburn, described the case as 'outrageous' for a number of reasons.

'First, we often see cases where a worker is not paid correctly. It's not so common to see a worker barely paid at all,' he said. 'Second, our client is a vulnerable worker – a visitor to Australia trying to scrape together an income while he completes his studies.'

Mr Durrani is seeking about \$4000 in wages he is said to be owed and lawyers are also pursuing interest, costs and penalties through the Workplace Relations Act that could run into the tens of thousands of dollars.

The case is complicated by determining who Mr Durrani's employer was.

The first defendant named in the claim is Unified Security NSW, while the second is Unified's director Geoff Chain. Mr Chain, who could not be reached for comment, is alleged to have threatened to 'kick the arse' of Mr Durrani in March if he continued to seek payment of wages owed to him.

Also named in the writ is a subcontractor to Unified, George Guirguis.

'It's not my fault whatsoever,' Mr Guirguis told *The Age*. He said he was not paid by Mr Chain for the work he did.

The other defendant named is the head security contractor to the Australian Open, Australian Security Services, and its director Harry Thompson.

'The threats of violence against our client are most disturbing of all,' Mr Weinmann said. 'A worker being threatened for trying to recover their wages is completely unacceptable.'

By **Ben Schneiders**, workplace reporter, *The Age* July 7 2008

STUDENT ACTIVITIES

1. According to the *Criminal Code Act 1995* (Cth) the definition of slavery is:

For the purposes of this Division, *slavery* is the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.

Do you think the treatment of Pakistani student Faisal Durrani fits into this definition? Discuss.

2. In the case of *Queen v. Wei Tang* (2008), the Full Court of the High Court was asked to define the legalities of 'owning' another human being. The High Court looked at the *Criminal Code Act 1995* (Cth), the International Covenant on Civil and Political Rights (ICCPR) and the International Convention to Suppress the Slave Trade and Slavery 1926 when defining the word slavery.
 - a. Would these documents be appropriate in the Faisal Durrani case? Discuss.
 - b. Are these documents intrinsic or extrinsic materials? Explain.
3. In the Wei Tang case, 'contract girls' were housed in bedrooms which slept up to four at a time on mattresses on the floor. Their passports and return tickets were locked away and freedom of movement was restricted until the girls had paid off debts of up to \$45 000 incurred in bringing them to Australia. The Full Court of the High Court decided that 'the accused must have knowingly treated the person as though he or she was the accused's property ... only when that state of mind exists is the exercise of power referable to a right of ownership as the section of the act requires'.

Do you think that state of mind exists in the Faisal Durrani case? Explain.
4. What aspect of the Faisal Durrani case is seen as the most unacceptable according to his solicitor Andrew Weinmann? How is this relevant to being treated like a 'slave'?

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