Submission on Human Rights (Parliamentary Scrutiny) Bill 2010

Australia will remain one of the few countries in the world not to have a formal human rights charter after the government rejected last September's recommendation of its own national consultation committee, for a Human Rights Act.

More than two and a half years after being elected—promising to consider a charter—the Labor government has killed off any notion of limiting official power to override basic legal and democratic rights. A further review of the issue has been put off until 2014.

The decision has dismayed those who were led to believe that the election of a Labor government in 2007 would mean an end to the type of abuses that saw innocent men such as Dr Mohammed Haneef, Mamdouh Habib, David Hicks and Izhar ul-Haque framed-up on terrorism charges, US anti-war activist Scott Parkin deported and refugees detained indefinitely on remote islands.

The legislation proposed by the committee would have been toothless—it would not have entrenched any legal or democratic rights by amending Australia's constitution, nor would it have given the courts the power to invalidate government measures that violated human rights. Instead, the High Court would only have been able to issue advisory opinions of incompatibility with certain human rights, which the government would have been free to ignore.

The government's rejection of even that token framework—a decision that was immediately backed by the Liberal-National opposition and most media outlets—underscores the lack of any support in ruling circles for basic political and civil rights. An *Australian* editorial declared: "Kevin Rudd has acted decisively in closing the door on an Australian bill of rights for at least a generation. This is the right call." Paul Kelly, the newspaper's editor-at-large, praised the prime minister for "dismissing the totemic symbolism of a human rights act".

Attorney General Robert McClelland gave no reason for the decision, except to say that the government preferred to proceed on human rights in a way that "unites rather than divides our community". In fact, the most vehement opposition to a charter came from within the Labor Party, spearheaded by former New South Wales Premier Bob Carr. During his decade in office from 1995 to 2005, Carr instituted a series of "law and order" measures, handing unprecedented powers to the police, boosting the state's jail population to record levels and backing the introduction of matching federal and state "anti-terrorism" legislation.

Carr and other Labor figures demagogically claimed that any human rights law would hand power to "unelected" judges and override parliamentary sovereignty. In reality, their objections are to any restriction, however perfunctory, on the increasing tendency of executive governments to ram police-state measures through parliament, under the false pretence of protecting ordinary people from crime and terrorism.

When the government appointed its committee in December 2008, McClelland claimed that it would give Australians "a chance to have their say" and encourage "a broad range of options" on protecting human rights. Yet, the terms of reference specifically directed the committee not to consider a "constitutionally entrenched bill of rights". What was ruled out

in advance was any genuine public debate that would in any way challenge the anti-democratic character of the 1901 Australian constitution, which contains no bill of rights.

Unlike the US Constitution, whose Bill of Rights arose from the revolutionary overthrow of British tyranny, the Australian document was not the result of any mass social movement. Instead, it was adopted as a British Act of Parliament after being drafted by assemblies of colonial politicians. Meeting in the wake of major industrial strikes that raised the spectre of the working class, the constitutional convention delegates not only rejected calls for a US-style bill of rights. They also retained the vague "reserve powers" of the monarchy to dismiss elected governments in times of political crisis—powers that were used to oust the Whitlam government in 1975.

The constitution does not even guarantee the right to vote. Some property qualifications were initially maintained, along with state-based disqualifications of Aboriginal people. The only rights mentioned in the constitution relate to religious freedom, jury trials for indictable offences and compensation for property acquired by government. During the 1990s, the courts declared there was an implied constitutional right to freedom of political communication, but said it could be overridden by legislation in many circumstances.

The committee's nine-month human rights "consultation," involving submissions and public hearings, sought to promote the illusion that certain basic rights could be protected even as the government maintains the draconian terrorism laws, further boosts the security and intelligence agencies and reinforces the detention of refugees without any legally-enforceable appeal rights.

Another significant political purpose of presenting human rights recommendations was, in the words of the committee's report, to "bolster Australia's credibility when commenting on human rights abuses in other jurisdictions". A related aim was to reduce the number of human rights cases taken against Australia to international bodies. These considerations of global image are particularly important to the political establishment where military interventions are being continued, in the name of democracy and human rights, to secure the strategic interests of Australian capitalism in Afghanistan, Iraq, East Timor and Solomon Islands.

None of the committee's recommendations limited the operation of the terrorism laws, the police powers or the refugee provisions.

While it ultimately recommended a Human Rights Act, the committee proposed the weakest possible form—a so-called "dialogue" model with no powers given to judges except to refer any legislative breach of human rights back to the government for consideration. Moreover, like the charters already adopted in the state of Victoria in 2006 and the Australian Capital Territory in 2004, the Act would have contained a derogation clause permitting the government to set "reasonable limits" on rights "that can be demonstrably justified in a free and democratic society". Such provisions are an open door for overriding rights in a host of circumstances, including for "national security" and "emergencies".

The Brennan committee contained a number of fallback positions to make it easier politically for the government to reject any human rights charter. These options included laws requiring judges to interpret all legislation in the light of internationally-recognised human rights, and to instruct official decision makers to take such rights into account. But the government

dismissed even these palliatives. Instead it adopted two other proposed sops, to stipulate that federal legislation include non-binding statements of compatibility with human rights, and to establish a parliamentary human rights committee to scrutinise legislation.

McClelland pointed to the cosmetic character of these provisions when he said they would assist ministers to "contextualise human rights considerations, and where appropriate, justify restrictions or limitations on rights". He also limited the human rights criteria to seven international conventions that Australia has previously signed, on civil and political rights, racial discrimination, economic, social and cultural rights, torture, women, children and disabilities. Noticeably, the list does not include the 1951 Refugee Convention, which the government recently flouted by suspending all asylum applications from Sri Lanka and Afghanistan.

To justify the government's decision, media commentators generally suggested that a Human Rights Act would have been unpopular. In the words of the *Australian's* legal affairs editor Chris Merritt, Labor wanted to "remove a potential election issue". But the Brennan committee reported widespread concerns about the deepening assault on basic rights, particularly in the ongoing Northern Territory intervention—which has singled out Aboriginal people for discriminatory welfare, land and policing measures—the treatment of asylum seekers and the national security legislation. A random telephone survey commissioned by the committee recorded 57 percent support for a Human Rights Act, with 14 percent opposed and 30 percent undecided. Nine of out 10 respondents supported the wider proposition: "Parliament to pay attention to human rights when making laws".

The government's dismissal of these sentiments is a warning of its determination to retain an open hand to violate fundamental rights as it continues to bolster the powers and resources of the police, intelligence and military agencies.

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