

David Marr: Does Australia really give a damn about human rights?

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The Tenth Human Rights Oration

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This year's keynote speaker - journalist, author, and political and social commentator David Marr - proposed that making headway on rights requires us to ask, 'what is it about our history, politics and press that gives the enemies of human rights such traction in Australia?'.

Australia is 110 years on from Federation and still hostile to guarantees of human rights that most civilised nations take for granted. The 2009 Brennan Committee's consultation revealed overwhelming support for a National Human Rights Act but the Government rejected the proposal.

The Human Rights Oration is an annual lecture series that provides a platform for the discussion of human rights as it applies to the everyday citizens.

Belling the Cat

David Marr

I would like to start by saying a word to the people who are outside in Federation Square waiting to see Oprah who might be surprised to find on the big screen out there *me* talking about human rights. I won't be there for very long. But my message to you is this: Oprah came to Australia the other day and she has cuddled koalas, and she has seen Uluru, but I think nothing about us would surprise her as much as the fact that Australians still don't have the rights Americans have had for the last 200 years.

Australia's failures to provide national protection for rights are now so many over so many years that the failure itself becomes a grimly interesting subject. Australians have become a unique species: a people without any national guarantees of free speech or freedom of assembly or of due process. And we seem happy enough to stay that way. It makes us a species worth studying.

For 50 years Labor in Opposition has been promising a human rights act once back in power in Canberra. And every new Labor government lets Australia down without much of a fight. Lionel Murphy's bill for which there had been such high

hopes was allowed to die with the parliament in 1974. Gareth Evans' bill never made it to parliament. Lionel Bowen's bill was at least debated 25 years ago - I think it's probably the last full scale human rights debate in the national parliament - but like all the others it was allowed to die. Today's Labor Attorney-General, Robert McClelland, set Frank Brennan's team off on its national journey of exploration and Kevin Rudd ditched their proposed charter in April without a meeting, without a word of explanation.

This is failure of a particularly interesting order. Elsewhere in the world in those 50 years, Britain, New Zealand and South Africa all signed up to rights regimes. Canada - God bless and preserve her - did it twice. That a charter is on the way in Tasmania, is secure in the ACT and - at least for the time being shelters Victorians is, of course, welcome. Entirely welcome.

But it remains a fact that despite all the hopes and campaigns of the last half century, Australians remain uniquely exposed to mistreatment by bureaucrats and government. We want better protection of rights - the polls show us that - but not having them provokes little concern round the kitchen tables of the nation. We muddle through, hoping and trusting. It's the Australian way.

After the last debacle, campaigners know the human rights bandwagon is going to have to stay under tarps in the garage for quite a while. A few useful ideas proposed by Brennan's team look like seeing the light of day. But an exercise of the Brennan kind, on that scale, can't be repeated for years. My advice - speaking as someone who did nothing useful during that process - is to use the time to make an unflinching appraisal of how these campaigns have been fought and should be fought.

It's my view this issue will not gain the traction it needs in this country while the debate remains a polite - if at times heated - series of exchanges between lawyers about laws and models and theories. It is time we were less polite; time to name the enemies of rights and identify their motives. It's time - as George Pell is so fond of saying - to bell the cat.

"No reasonable person can object to the protection of rights," Helen Irving wrote recently in her essay *A Legal Perspective on Bills of Rights*. "Those who question the bill of rights agenda are rarely contemptuous of rights ... most are concerned, rather, about the best *means* of protecting rights..."

That formula has to be questioned sharply. I have no doubt Professor Irving is accurately stating her own position and the position of some others. But this struggle is not driven by abstract constitutional concerns. The opponents of bills and charters are tramping the corridors of Canberra and polishing opinion pieces for *The Australian* because they *do* object to the effective protection of rights. That is the point. It is time we said so. This is not a 50-year contest in Australia about ways and means. This is about outcomes.

Pell throws at rights protection every argument he can muster. He is fighting for the common law; he is fighting for parliament; he is fighting for democracy; he is fighting for what he calls “moral truth”. His essay Four Fictions shows him keenly aware of the fragility of rights protection in today’s Australia. He argues:

The asylum seeker issue highlights where the limits of the ethic of the fair-go among the majority can be encountered. I wonder about the consequences for Australian democracy if we were to suffer a major terrorist attack on our own soil ...

And so do I wonder. But the cardinal has two lists. On the good list are rights he approves:

The rights of Aborigines and indigenous or racial minorities, women ... homosexuals [so he says], migrants and the poor, the disabled and elderly...

On the bad list are rights to life, sex and death that don’t square with formal, conservative Christian teaching. It looks to me - though I might be an exasperated atheist - that Pell is willing to see *all* rights exposed to the uncertain protection offered by parliaments and politicians rather than risk “What can happen when a charter of rights is interpreted from the premises of the secular mindset.”

Pell is fighting the erosion of the ancient role of bishops and preachers as the sex police of society. This is why a determined group of Christian leaders are the principal opponents of formal rights protection in this country. They in turn enlist conservative politicians on both sides of politics - politicians who agree with them, and politicians who don’t have the stamina to stand up to them. As one of the most highly placed human rights observers remarked to me - off the record: “If you could turn church leaders around, you’d turn the debate around. They give credibility to opposition.”

I know it’s hard. I know it goes against the polite grain. But unless human rights advocates are willing to have an open brawl with their most effective opponents the hopes of a national charter - let alone a bill of rights - are doomed.

Not all churches are the same, not all preachers and not all bishops. It makes no more sense to lump all Christians together than lump all nations together into a single bloc. The human rights movement has deep Christian antecedents which Brigadier Jim Wallace of the Australian Christian Lobby - one of the staunchest opponents of bills and charters of rights - describes so eloquently in his essay *Why Should Christians be Concerned About a Bill of Rights*:

We can see throughout history many Christians taking action to preserve [human rights], whether by ending the slave trade, supporting persecuted believers in other countries, championing civil liberties for negroes in the US, defending the right to life of the unborn, affirming the worth of people with disabilities, or exercising leadership in the early trade union movement.

But the brigadier is dead against letting judges decide rights because that would put at risk his beliefs on life, sex and death, plus - and here he shows his protestant colours - pleasure. Wallace deplors the fact that:

In America, it has been successfully argued that naked dancing in bars is protected by the outer limits of the First Amendment because it is a form of sexual expression.

Wallace wants a system that will ensure the continued social disapproval of homosexuals - his expression - marriage and adoption only for heterosexuals and no more naked dancing in bars.

Crucial to the arguments of Christians fighting bills and charters is that they are protecting the mainstream from an unscrupulous moral minority. Pell sees this "suspicion of majority" as an attitude that bleeds into suspicion of democratic politics and suspicion of the decent feelings of mainstream Australia. He writes, and I so love his rhetoric:

It helps to understand the game that is afoot in the push for a charter of rights to consider the way 'the tyranny of the majority' is used to browbeat majority scepticism about minority agendas.

Statements like this are everywhere in the submissions to Brennan, the pages of *The Australian*, the pages, indeed, of *The Age*. Politicians sprout them continuously. It's infectious. Spruikers for rights give their opponents aid and comfort by casting their own arguments - too much of the time in my view - in terms of protection of minorities. That undoubtedly matters, but the key to the worst overreach of governments is panic about minorities. The vice, most of the time, is panic.

In any case, these claims to be defending democracy are simply rubbish. This isn't opinion v. opinion. Polls show conservative Christian teaching on contraception, abortion, cloning, chastity, divorce, homosexuality and euthanasia are all now - and have been for some time - minority positions. These Christians haven't even been able to hold the line on gay marriage. While Australia remains divided on the issue, last month's Nielsen poll found 57 percent support for gay marriage, six percent undecided, and only 37 percent backing conservative Christian opposition.

Let's bell this cat: conservative Christians do not want courts protecting rights because the political process is their best hope of defending - and perhaps imposing - beliefs that are becoming increasingly distasteful to the Australian people.

In this week, in this glorious week, as Wikileaks delivers a river of truth to the world, I reflect particularly on the rock solid opposition to bills and charters of rights presented by *The Australian*. It is to my mind astonishing that a newspaper would campaign against rights. *The Australian* does and it has its reasons - and I am not going to analyse those reasons now. But they are reasons of conservatism and,

on the part of its leading political correspondent Paul Kelly, a deep and passionate commitment to parliamentary democracy in which he sees no role for lawyers. It does not describe the Australia I know let alone the Australia I want, but it is passionately and sincerely believed.

But this week, with Wikileaks pouring out those truths! From *The Age* this morning we now know Australian politicians, generals and officials actually think about our commitment to Afghanistan. It is there. We haven't had to wait 30 years. It is there on the Thursday of this week.

Over in the United States of America there are calls for Julian Assange, an Australian national to be hunted down as if he were a terrorist. There are calls that he be thrown into prison for the rest of his life. The United States government is using its muscle to cut off money to Wikileaks, to prevent credit card providers having contact with Wikileaks sites. It has bludgeoned Amazon and other sites to stop carrying Wikileaks. But *The New York Times* goes on publishing but it has the First Amendment on its side. And everybody in America knows, that for all the grandstanding going on there at the moment, *The New York Times* will continue to publish by my estimation - considering there are 250,000 documents in this pile - for about the next 20 years, the truth of the Bush and Obama administrations.

And yet there are newspapers which - like politicians and churchmen - would prefer to live in the world of lobbying, of influence, of back room discussion rather than the world of rights that can be enforced in public arenas.

In a sense, asking a politician to support a bill or charter of rights is a bit like asking a burglar to endorse burglar alarms. And so, those politicians who do are to be honoured. Those politicians who don't - and I'm not going to go into much detail today - are interesting and caught in an interesting bind.

George Brandis attacks any regime of rights protection from the point of view of a man who, in his heart, wants us all to have the broadest possible ambit of rights. But read his elegant essays, pick your way through the clever contradictions, note those familiar appeals to British habits that are outmoded even in Britain now, and you end by knowing in your bones that he is not really committed to rights. He doesn't want to see them guaranteed by courts. He and his party are on the side of lobbying, influence and power. And so are large chunks of the Labor Party.

Bob Carr, the man who loves so much about America, American history, and the Democratic Party, loathes the First Amendment that has made America what it is. He wants nothing like it here.

Carr is not alone in Labor. The party that has been promising rights and charters forever but no national Labor leader since Bert Evatt departed the leadership to become, tragically, the Chief Justice of NSW in 1960, has been willing to *fight* for rights, to put skin in the game. The lesson of Pierre Trudeau is that national rights reform only happens when leaders throw their hearts and perhaps their careers

into the contest. Even he didn't quite pull it off in Canada: he didn't reach his goal of effectively embedding rights in the Canadian constitution.

Since the catastrophe of 1988, we've been told not even to dream of constitutional solutions in Australia. What an unexceptional list was on offer then. As Helen Irving would ask: what reasonable person could object to such rights? Yet all three proposals - to extend trial by jury, confirm freedom of religion and make state governments pay a fair price for properties they acquire - were lost overwhelmingly.

You know the score now: 44 failures from 52 attempts to change the constitution by referendum. This is a result that has to make us look at ourselves. Not just at a difficult-to-change system but at our attitudes, about the way Australia thinks. The lesson we are supposed to draw from all of those defeats is that Australians hate change, or at least hate to change the constitution. That's not untrue. But the deeper lesson is that Australians - contrary to our larrikin myths - are people with a deep respect for authority.

We are more Canadian than Yankee: more at home with the Canadian notion of "peace, order and good government" than the notion of "life, liberty and the pursuit of happiness" that runs south of the 45th parallel. Much that is wonderful about life in this country is wrapped up in the contradiction between who we think we are and who we really are: a tractable, law-abiding people who may loathe politicians but respect authority.

So when it comes to changing the constitution - indeed when it comes to changing any of our institutions - we only move when we're told. Americans find it much easier to change their constitution not only because of the machinery of the thing, but because they are more used to making up their own minds. We won't move unless our leaders speak as one and tell us to move. This isn't our commitment to the constitution so much as our commitment to authority.

In 1988 our leaders were divided, so those unremarkable proposals went down in flames. I found myself - not long afterwards - spending a pleasant day driving around South Africa in the company of one of Howard's shadow cabinet. Over lunch, I quizzed him about the referendums. I was a bit narky about the outcome of the referendums. I couldn't believe, for instance, that Howard had opposed another of the proposed constitutional changes that would rid Australia forever of gerrymanders, a curse that had so often worked against conservative interests. Ah, replied Michael Wooldridge, we couldn't support that because we would have lost our majority in the upper house of Western Australia. So Howard spoke and Australia delivered a 62% no vote.

As someone who still hopes for constitutional reform to protect rights I was disappointed by the Rudd government setting as a ground rule for Frank Brennan's inquiry that bills were not to be contemplated, only charters. This pre-emptive

buckle, as it turned out, didn't keep out of the contest those critics furious at the prospect of unelected judges thwarting the will of democratic parliaments. They simply ignored the distinction between bills and charters: they kept angry and they carried on.

But hobbling Brennan in that way did acknowledge - and probably wisely - that the times are not right for a bill of rights. No one should doubt how hard it is to embed human rights in constitutions. History tells us such rock solid guarantees are only given after national upheavals of a kind we would not wish on this country. Look at the list: the US First Amendment after a war of independence; The Declaration of the Rights of Man after the French revolution (and that one didn't last); the European Convention on Human Rights after the Second World War; and South Africa's Bill of Rights after the long nightmare of Apartheid.

Australia lost its chance as its constitution was being drafted here in Melbourne over a century ago. Whether we know it or not, all we advocates of constitutional and legal protection of rights in Australia in 2010 are still picking around in the wreckage of one day in the life of the Australasian Federal Convention in February 1898. Apart from anything, it was staggeringly hot: 40 degrees in the shade. As fires raged through the Grampians and smoke obscured the sun, Australia's best hopes of a bill of rights were burnt to a crisp.

A bit of history: little fuss had been made at earlier conventions of the idea of incorporating into our constitution the "equal protection of the laws" established in Fourteenth Amendment of the US Constitution after the Civil War. But its enemies led by Isaac Isaacs were waiting to pounce in Melbourne. It's a strange reflection that the leaders of the contest that day - in whose shadows we still work - were both Australian sons of persecuted peoples: Isaacs the brilliant, tedious, dogmatic child of a Polish tailor couldn't abide the idea proposed. Richard O'Connor the charming son of an Irish librarian begged the delegates to put into the Constitution they were drafting

A guarantee for all time for the citizens of the Commonwealth that they shall be treated according to what we recognise to be the principles of justice and equality.

The 42 delegates camped in the Legislative Assembly of the Melbourne parliament growled and sniped for an hour, broke for lunch and came back - clearly in a foul mood - to shred that rights initiative in less than 20 minutes. First went the notion that:

... a state shall not make or enforce any law abridging any privilege or immunity of citizens of the Commonwealth.

Then hacked down was:

... nor shall a state deprive any person of life, liberty, or property without due process of law.

And finally by 23 votes to 19 the delegates ditched

... or deny to any person within its jurisdiction the equal protection of its laws.

According to the great myth that has grown up about the decision, this was the point at which an emerging Australia rejected American ways and stuck to its British guns, turning its back on the allure of constitutional protection of rights in order to stick with the Common Law and responsible government. It has been billed ever since as a nation-making moment.

Sir Owen Dixon and Sir Robert Menzies sang this song particularly when over in America when lecturing Americans on the drawbacks of their own constitution. In his rough, democratic accents Michael McHugh belted out the same refrain in *Australian Capital Television v. The Commonwealth*:

The makers of the Constitution ... rejected the United States example of a Bill of Rights to protect the people of the Commonwealth against the abuse of governmental power ... because they believed in the efficacy of the two institutions which formed the basis of the Constitution of Great Britain and the Australian colonies - representative government and responsible government..."¹

But this is - to use a term of abuse plucked from the lexicon of *The Australian* - a judicial invention. Read the transcript of that day's debates and you find no such high flown considerations in the air. No hymns were sung to British ways. Not even the most conservative delegate - stand up if you can after a long lunch Sir George Reid - attacked the theory of allowing courts to set limits to the exercise of government power. Defence of states' rights, yes. Defence of responsible government, no.

This was not a contest in the abstract but the particular. The delegates did not vote against rights but against *these* rights. Why? Because, as Isaacs put it so bluntly, their original object in America was "to protect the blacks", and in Australia they would "protect Chinamen in the same way". The delegates' vote was not about preserving British values down under, but the birth of a white man's Federation. Sir John Forrest belled that cat during that day's debate:

It is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but still it is so.

In fact, as the heat rose and the lunch proved bad the delegates became less and less inhibited. With the point by point endorsement of Isaacs, John Cockburn of South Australia spoke with the passion of a planter stripped of his slaves as he

condemned the proposed guarantees as vindictive abroad and unnecessary at home:

They were introduced, as an amendment, simply as a punishment to the Southern States for their attitude during the Civil War ... to inflict the grossest outrage which could be inflicted upon the Southern planters, by saying: 'You shall not forbid the negro inhabitants to vote. We insist on their being placed on an equal footing in regard to the exercise of the franchise with yourselves.' I do not believe that this amendment was ever legally carried ... it was simply forced on a recalcitrant people as a punishment for the part they took in the Civil War. We are not going to have a civil war here over a racial question.

One way of gauging the astonishingly racist temper of the discussion that day is to note that no delegates even mentioned Aborigines. The guarantees they were shredding would have given citizenship, the vote and the equal protection of the law to Aborigines in, I might say, perpetuity. But this didn't even rate a mention - not as a reason for, not as a reason against the proposal. Aborigines were not in the delegates minds. They were fighting the guarantees in order to keep Chinese off the West Australian goldfields and out of the factories of Victoria.

O'Connor and Isaacs slogged it out, back and forth. Isaacs had the US case law at his fingertips. The Supreme Court in *Yick Wo v. Hopkins* had called on the "equal protection" provisions of the Fourteenth Amendment to strike down a San Francisco city ordinance designed to put out of business all the Chinese laundries in the city. Isaacs did not object to the validity of that ordinance being decided by the Supreme Court of the US. His target was not an unelected judiciary. He just didn't want the same protection extended to the Chinese in Australia.

What's the point of this excursion into history? To bell yet another cat. The rejection of courts and judges to safeguard human rights is not in the DNA of this nation. It is not. That is an invention. The fight is worth continuing. Success is still possible. Alas, what is in our DNA is a marked reluctance to extend rights to "coloured persons" And it is of no use for us to shut our eyes to that fact...

In 1898, not for the last time, we chose between race and rights and the price we have all paid is high. The politics of rights protection continues to be - and I seek the polite word - *complicated* by the fact that those who most obviously need protection these days aren't named McClelland or Evans or Murphy or Ruddock but Haneef, Al Kateb and Ul-Haque.

You have all heard of Murphy's Law: if something can go wrong it will go wrong. But scholars of Murphy Laws know there are many Murphy Laws and one of them - my favourite - is: whenever you want to do something, you have to do something else first. If we want effective national rights protection in this country we have to openly engage with the principal challenges and the principal opponents and the

fact - unpleasant as it is to face and difficult to counter - that their opposition is largely derived from issues of race and religion.

Now I am not for a moment saying that the resolution of these difficult issues can be left to the courts. They must not be left to the courts. These are issues that must also be debated and distilled in parliaments. But the courts have a fundamental role in making sure that the wishes of the parliaments can be enforced throughout the community.

Isaacs lived a very long time: long enough to be our first native-born Governor-General; long enough to watch the anti-German panic that swept Australia in the First World War; long enough to watch civilised Germany descend into the Holocaust; and to witness Australia's appalling response in the late 1930s to Jewish refugees who wished to come here. Indeed, he lived long enough to see Auschwitz emptied. I wonder if at any time in his late life he reflected on O'Connor's wise words on 8 February 1898 about the role the law might play in protecting us all - not minorities, but all - from the madness that sweeps nations from time to time. O'Connor said:

We are making a constitution to endure, practically speaking, for all time. We do not know when some wave of popular feeling may lead a majority in the Parliament of a state to commit an injustice by passing a law that would deprive citizens of life, liberty, or property without due process of law. If no state does anything of the kind there will be no harm in this provision, but it is only right that this protection should be given to every citizen of the Commonwealth.

It wasn't. It still hasn't. And we still need it.

¹ Australian Capital Television Pty Ltd v. The Commonwealth (1992) 177 CLR 106 at 228-229.