Chapter Seven

Bills of Rights: Some Reflections on Commonwealth Experience

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During the constitutional conventions leading up to the federation of the Australian colonies in 1901 Andrew Inglis Clark proposed an Australian bill of rights.[1] In the 1940s HV Evatt attempted to insert into the Constitution recognition for basic rights derived from international legal norms. And in 1988 the Hawke Government proposed constitutional guarantees for rights and freedoms as well as fair elections.[2] A groundswell for an Australian bill of rights is again rising.

A notable feature of the current debate over a bill of rights in Australia is that it is so sharply polarised. It is the nature of this public debate, and the assumptions underpinning the competing arguments, that will be the focus of this paper.

It is rightly said that a question well framed can provide, at least inferentially, the answer to that question and the reasons for that answer. This proposition is frequently demonstrated in the public debate in Australia about the adoption of a bill of rights. The debate is commonly framed both by proponents and opponents in a manner designed to deliver a preferred answer. Those in favour of a bill of rights might, and do, ask: "Do you think it wrong for a government to infringe the human rights of its citizens?". Of course. "Do you think a government should be prohibited by law from infringing the human rights of its citizens?". Naturally! "Do you support the adoption of a bill of rights?". Which leads to the answer, "Yes".

Alternatively, those opposed to a bill of rights might, and do, ask: "Do you think the people through the democratic process should determine the laws under which they live?". Of course. "Do you think it wrong for unelected judges to determine what democratically enacted laws should or should not be followed?". Yes. "Do you oppose the adoption of a bill of rights?". Which leads to the answer, "Yes".

Both sets of questions are framed to produce only one logical response, and to provide the reasons for that response. But whether or not Australia should adopt a bill of rights is not capable of resolution by rhetorical assertions alone. Whether or not Australia should adopt a bill of rights requires competing public policy considerations to be weighed. The form in which the current debate is frequently framed is not conducive to weighing those public policy considerations.

My intention for this paper is not to persuade this audience about the desirability or the undesirability of a bill of rights for Australia. My intention is far more modest: to clarify the key public policy considerations that should be weighed to determine what value, if any, a bill of rights may have for Australia.

This paper is divided into three parts. Parts 1 and 2 respectively will address the pro- and anti- bill of rights propositions set out in the questions above. Part 3 is directed more specifically to the British Commonwealth experience with bills of rights, although that theme runs throughout this paper. Part 3 will address one particular aspect of the current debate: what conclusions for Australia may legitimately be drawn, first from the fact that most common law nations today have a bill of rights, and second, from the experiences of those nations in operating their bills of rights.

Part 1: The case for a bill of rights in Australia

The first set of questions, which is designed to elicit support for a bill of rights, is underpinned by three assumptions. Firstly, that human rights are at present not protected in Australia. Secondly, that a bill of rights will protect human rights in Australia. And thirdly, that parliament should never infringe human rights, and that the government should be restricted by law from infringing human rights. It is convenient to consider each assumption in turn.

It is an obvious oversimplification to state that human rights are not protected in Australia. The method of protecting rights in Australia follows the Westminster system. The mechanism for the protection of rights under that model may best be explained by reference to the writings of the two most influential English

constitutional lawyers, Sir William Blackstone[3] and Prof AV Dicey.[4] Simply put, a person may do anything not expressly prohibited either by the common law or by statute. Parliament is sovereign and thus can enact any law, but Parliament is elected by the people and answerable to the people through regular elections. Thus in theory Parliament can only limit the rights of the people with the people's approval. Further, the independent judiciary ensures that the executive adheres to the laws as enacted by Parliament.

The basic flaw in the Westminster model of protecting rights is most simply revealed in cases where a majority of the population wishes to discriminate against a minority of the population. Examples occur throughout the world on such bases as ethnicity or religious belief. Some familiar historical examples have included discrimination of Catholics in England following the Reformation, and of Africans in South Africa under apartheid.

But even in societies where the majority of the population does not want to discriminate against a minority, the Westminster system does not always protect against the general restriction of individual liberty. Such restrictions are commonplace during times of national emergency, whether real or perceived. England between 1914 and 1945 is a notable and, to many, a somewhat surprising example.[5] Some commentators point to anti-terrorism legislation as evidence that it may be occurring in Australia today.[6]

The second assumption is that bills of rights do protect human rights, or at the very least bills of rights are better at protecting human rights than the Westminster system.

It is useful to begin with a general statement about the utility of bills of rights before focusing upon the class of liberal democracies into which Australia falls. Three basic conditions must exist for human rights to be protected. Firstly, a majority of the population must want the human rights of all members of that society to be protected. Secondly, the views of that majority must be capable through democratic means of influencing government action. Thirdly, the rule of law must be respected. The importance of these pre-conditions cannot be stressed too highly.

In countries where these pre-conditions are not met, the presence or absence of a bill of rights will have little impact upon the protection of human rights. Where a majority of the people want to discriminate against a minority group, restrictive laws will almost inevitably follow. The discrimination against white farmers in Zimbabwe may fall into this category. Where the government cannot be swayed by the will of the people, restrictive laws will also almost inevitably follow. The discrimination against Africans by the government of Southern Rhodesia, as Zimbabwe was called under white rule, may fall into this category. Equally, if a government that does not respect the rule of law intends to violate the rights of its people, it will do so regardless of any legal impediment. Recent history in Africa provides countless examples: Ghana, Nigeria, Uganda—to name only a few.

Turning specifically to liberal democracies such as Australia, rights will usually be protected regardless of the presence or absence of a bill of rights because the above pre-conditions are met. That is, the people want to protect rights, the democratic process works, and the rule of law prevails.

The real question then becomes what constitutes an impermissible infringement of a right. The answer is rarely absolute, because notions of justice are not uniform. For example, where one person may see justice in a tobacco company's advertisements being protected by the right to free speech, another may see injustice in advertisements for a product that causes smoking-related illness being protected.[7] For this reason it cannot always be said that a bill of rights is better at protecting rights in a liberal democracy. A bill of rights merely uses a constitutionally fixed legal method to provide an answer to the question. The alternative, discussed below, is to permit Parliament to provide an answer using the democratic process.

The third assumption is that Parliament should never infringe human rights, and that Parliament should be restricted by law from infringing human rights.

The starting point is to recognise that most laws infringe the rights of some individuals in society.[8] Laws, according to Blackstone,[9] were the embodiment of a social contract. Persons living outside a community had absolute freedom to do as they pleased. The cost to such persons of becoming a member of a community, and gaining the concomitant benefits, was that the community could exercise a right to limit that person's absolute freedoms, but only as far as was necessary for the smooth operation of that community. Thus every law represents Parliament choosing to elevate the subject of that law ahead of the liberty that that law restricts. By way of illustration, by making the wearing of seatbelts in motor vehicles compulsory, Parliament has decided to elevate safety above the absolute rights of the individual to travel by vehicle in his or her preferred mode.

Parliament's traditional role was to restrict liberties to protect or to advance what it deemed more compelling public interests. Parliament's function remains to balance competing interests, with the inevitable

result that some rights will to some extent be abrogated. But to assert that Parliament should not and must not infringe rights is to misunderstand the parliamentary law-making process. The real question remains why that function should be limited.

Part 2: The case against a bill of rights in Australia

The second set of questions, which is designed to elicit opposition to a bill of rights, reasons from the premise that a bill of rights transfers power from the democratically elected Parliament to unelected and unaccountable judges.

The starting point is to address how a bill of rights works in practice. A bill of rights removes Parliament's legislative power to enact laws that infringe the rights enumerated in that bill of rights. In doing so a bill of rights limits both Parliament's power and the democratic process. This is the stark reality that must be the focus of any consideration about adopting a bill of rights.

The concept of removing certain matters from the power of Parliament is contrary to the Westminster tradition, whereby Parliament is sovereign and may legislate on any matter. But it is not contrary to the system of government in Australia.[10] The Constitution contains implied limitations on legislative power to ensure the integrity of the system of representative government[11] and the doctrine of the separation of powers.[12] However, these legislative prohibitions infrequently deal with issues normally the subject of a bill of rights, and it is the very nature of the issues normally the subject of a bill of rights that sets apart the judicial task of interpreting a bill of rights.

The role of the judiciary in dealing with a bill of rights is to determine the scope of the legislative power removed from the legislature by the enumerated rights. It is essentially the task of drawing a line in the sand to determine whether a statute is invalid because it infringes the protected rights. There is no transfer of power to the judiciary of a law-making function to create either rights or obligations.

At its simplest, the task of interpreting a bill of rights will involve determining whether a law infringes an enumerated right, such as whether a law banning public gatherings infringes the right to freedom of assembly. But in liberal democracies legislatures rarely enact laws which have as their *purpose* the infringement of rights. More common are laws that infringe one or more enumerated rights to pursue another legitimate public policy goal. For example, whether a law regulating a mother's ability to abort her foetus infringes the unborn child's right to life; or whether a law regulating the publication of photographs infringes either the publisher's right to free press or the subject of that photograph's right to privacy.

The complexity and significance of the judicial task is highlighted by the latter examples of competing public policy goals. This task does involve the exercise of considerable power with respect to shaping public policy. But this task is not an arbitrary exercise, reliant upon the idiosyncrasies of the judicial officer or officers before whom the matter is heard. The power given to the judges is a judicial function to be exercised according to judicial method. Judicial method ensures guiding principles emerge and are then followed as precedent.[13] The scope of the judiciary to determine those guiding principles is largely dependent upon the terms of the rights set down in that bill of rights. But the task of determining that content does fall to the judges. Whether that is a task best undertaken by judges is certainly debatable.

But to focus upon the repository of arbitral power is to lose sight of what is in fact taking place. Power is being taken away from the people, as represented through Parliament, to effect public policies that infringe the enumerated rights. It is a necessary incident of removing that power that determination of the extent of such removal falls to the judiciary. It is also a necessary incident of removing that power that the extent of that removal will not always be clear-cut, and that the method of that determination will be judicial method.

Part 3: The Commonwealth experience

What conclusions for Australia may appropriately be drawn, first from the fact that most common law nations today have a bill of rights, and second from the experiences of those nations in operating their bills of rights?

As to the first proposition, it is commonly stated that Australia should adopt a bill of rights because Australia is one of the few common law countries without one. Implicit in this proposition is the assumption that the reasons other common law countries have adopted a bill of rights are relevant to Australia.

To consider this assumption it is instructive to look to the United Kingdom, and also those Commonwealth countries that were still British territories after 1950. Those Commonwealth countries provide a convenient group because they constitute a large portion of common law countries with bills of rights.

Although the United Kingdom does not have a bill of rights, it is useful to consider the United Kingdom's situation because it adopted two human rights instruments with domestic application and it is the home of the Westminster system. The two human rights instruments are the *European Convention on Human Rights* and the *Human Rights Act* 1998 (UK). The *European Convention on Human Rights* was one of the first manifestations of that grand post-1945 scheme to avoid another European conflict through closer political and economic ties within Europe. Its current manifestation is the European Union.

The British government ratified the *European Convention on Human Rights* in 1950, extended its operation to its overseas territories in 1953, and gave individuals the right directly to petition the European Court of Human Rights in 1966. The reason that the United Kingdom adopted and extended the *European Convention on Human Rights* was to ensure that other countries in Europe did likewise, the rationale being that entrenched rights would halt the spread of Communism throughout Europe.[14] Protecting individual rights played no meaningful role in the British government's decision to ratify the *European Convention on Human Rights*. The *Human Rights Act* 1998 (UK) codified the *European Convention on Human Rights* into domestic law. The catalyst for this Act was the political necessity to achieve ever closer integration within Europe. Protecting individual rights played a more limited role in the British government's decision to enact the Act.

Most Commonwealth countries given independence after 1960 have a bill of rights. In 1951, bills of rights were virtually unknown in Britain's overseas territories. By 1962 bills of rights were being mandated for them. In this process over 30 nations and territories received bills of rights. The reason: fear of what might happen after independence.

These nations and territories may conveniently be categorised into groups: those with a population where voting was based on voter assessment of the competing policies of government and opposition, such as Jamaica; and those where voting was based on religious or ethnic affiliation and not on voter assessment of competing policies, such as British Guiana. In the former territories, the bill of rights' purpose was to lock in the basic features of the political system, so that subsequent governments could not transform the nation into a one-party state after independence; in the latter territories it was to assuage the fears of minority groups at the prospect of independence and the withdrawal of British protection. Because a bill of rights restricts a government's power, sitting governments were reluctant to adopt a bill of rights without a pressing political imperative. Let me be absolutely clear: bills of rights were *not* being adopted to protect individual human rights.[15]

One further observation warrants mention. In the great majority of British overseas territories, a bill of rights was viewed as a conservative force to lock in the system of government operating at the time of independence, and thus stop post-independence radical (and frequently Communist) legislative reform agendas. In Australia the position is reversed. The Westminster system, with plenary legislative power, is viewed as the conservative system, and a bill of rights which locks in certain rights is viewed as the more radical alternative.

The necessary conclusion is that the reasons that bills of rights were adopted in a large proportion of common law countries are not relevant to Australia. In both the United Kingdom and British Commonwealth, human rights instruments were used as political tools to further political agendas. The primary reason for their adoption was not to protect individual liberties. The primary purpose of an Australian bill of rights is to protect individual liberties. If Australia chooses to adopt a bill of rights to protect individual liberties, it will be one of the few common law nations to have taken such a course without a political imperative.

As to the second proposition: since bills of rights are so prevalent in the common law world, what might happen if Australia adopts a bill of rights?

The British Commonwealth experience with bills of rights indicates that a bill of rights drafted in general terms can have a significant impact both at a practical and institutional level. Lord Phillips, the current Chief Justice of England, described the ratification of the *European Convention on Human Rights* and resulting *Human Rights Act* 1998 (UK) as one of the most significant constitutional developments in England since the enactment of the Bill of Rights of 1689.[16] Certainly bills of rights are apt to have profound consequences. But without knowing the form and terms of a proposed Australian bill of rights, predictions about its impact are impossible to make. Equally, even if the form and terms of the bill of rights were known, predictions about its impact are still highly unreliable.

No two nations have had identical experiences with their bills of rights. Several reasons stand out: every bill of rights is unique; the constitutional system in which each bill of rights operates is unique; and the legal

culture in which each bill of rights is litigated and interpreted operates differently.

An example conveniently demonstrates this point. Some commentators assert that a bill of rights will politicise the judiciary, with particular reference to the experience of the Supreme Court of the United States. The term politicise is used to mean that court appointments will be based on party political affiliation and that judges will vote along political or ideological lines. Turning to the British Commonwealth, the presence of bills of rights has not tended to politicise the judiciary. Institutional considerations in the United States may explain this difference, such as the tradition in some States of the United States to elect judges, and the historically longstanding role of the Supreme Court as a political institution.

The necessary conclusion is that the impact of a bill of rights in Australia cannot be known, and assertions about any predicated legal and social outcomes, whether positive or negative, should be viewed with great caution.

Conclusions

To return to the premise of this paper: the public debate about whether Australia should adopt a bill of rights has been framed by proponents and opponents alike to produce a preferred outcome. What then should be the focus of the inquiry into whether Australia should adopt a bill of rights?

The public debate over a bill of rights for Australia is frequently drawn to what should be regarded as secondary considerations. The influence of the judiciary upon public policy, in its capacity as the repository of arbitral power over a bill of rights, is a necessary but fundamentally incidental feature of having a bill of rights. The prevalence of bills of rights throughout the common law world is a minor consideration for Australia when the circumstances under which most nations adopted their bills of rights are examined. Further, caution should be undertaken when arguing by analogy with reference to the experiences in other common law jurisdictions, unless those experiences are understood within their unique legal and political contexts. Moreover, the impact of a bill of rights upon Australia will largely be dependent upon the form and terms of that document. Without knowing the form and terms of that document, arguments based on the experiences of other nations are likely to be highly misleading.

Rights in Australia are protected according to the Westminster model. In liberal democracies that operate under this model, rights are rarely infringed, because the public will and institutional mechanisms exist to protect human rights. Disagreement usually focuses upon nuanced understandings of what constitutes an impermissible infringement of a right.

Because laws are a balance between competing rights and other policy goals, and the appropriate balance between those rights and policy goals is often ambiguous, neither the absence nor presence of a bill of rights can ensure universal acceptance that all rights are being protected. A bill of rights merely provides one method of determining that balance between competing rights and policy goals.

The real question facing Australia is whether the power of Parliament should be limited with respect to certain rights. A bill of rights would limit Parliament's traditional role in determining public policy on certain subjects that interact with the rights in that bill of rights. This would mean Parliament could not realign those rights against other policy goals. And the balance set down in the bill of rights could not be altered without recourse to a referendum. Thus perceived injustices would not be capable of correction, and laws could not necessarily be amended to reflect changing social conditions. In this way, a bill of rights limits the democratic process by taking power out of the hands of the people.

The decision about a bill of rights must primarily be viewed as a choice between Parliament having the power to balance competing rights and policy goals, and Parliament having that power permanently removed to ensure that some rights are never abrogated. This is the reality that the public must focus upon and grapple with in assessing any proposal for a bill of rights.

Endnotes:

1. George Williams, *Human Rights and the Australian Constitution* (Oxford: Oxford University Press, 1999), pp. 25-45.

2. Simon Evans, *Australian Bills of Rights—A Short History* (Liberty Victoria Symposium, 13 August,

2005, www.law. unimelb.edu.au/cccs).

3. *Commentaries on the Laws of England* (1769).

4. *Introduction to the Study of the Law of the Constitution* (1885).

5. C Gearty and K Ewing, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law 1914-1945* (Oxford: Oxford University Press, 2000).

6. Hon Sir Gerard Brennan, *Liberty's threat from executive power*, *The Sydney Morning Herald*, 6 July, 2007.

7. *RJR-MacDonald Inc v Canada (Attorney General)* [1995] 3 SCR 199; *Canada (Attorney General) v RJR-MacDonald Inc* [2007] SCC 30.

8. The complexity of modern legislation makes this analysis inappropriate for all legislation, but it provides a useful model for present purposes.

9. *Commentaries on the Laws of England*, BK 1, ch 1, pp. 120-2.

10. Owen Dixon, *The Law and the Constitution* (1935) *Law Quarterly Review* 590 at 597 and 604.

11. *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1.

12. *Attorney-General (Commonwealth) v. R; Ex parte Boilermakers' Society of Australia* (1957) 95 CLR 529.

13. *Shop Distributive Employees' Case* (1976) 135 CLR 194 at 216 per Mason and Murphy JJ.

14. Brian Simpson, *Human Rights and the End of Empire* (Oxford: Oxford University Press, 2001).

15. Charles Parkinson, *Bills of Rights and Decolonization: the emergence of domestic human rights instruments in Britain's overseas dependencies* (Oxford: Oxford University Press, forthcoming 2007).

16. Lord Phillips, *Foreword*, in Leigh-Ann Mulchany, *Human Rights and Civil Practice* (London: Sweet & Maxwell, 2001), vii.