Chapter Seven

Does Australia Need a Bill of Rights?

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Nowadays bills of rights are to be found in most democratic countries in the world--like Aids, one might add, if one were tempted to be frivolous and to adapt Malcolm Williamson's remark about the music of Andrew Lloyd Webber. Does Australia lack something which is essential to modern democracy, or have we simply resisted the temptation to follow fashion for fashion's sake? Of course, nowadays nobody would be prepared to express agreement with Bentham's view that to talk of human rights is "rhetorical nonsense".1 There is general agreement that there are human rights and freedoms which are fundamental and which it is the duty of the state to protect. It is much more difficult to find agreement as to what those rights and freedoms are. As I shall endeavour to show, it would be unduly optimistic to think that a bill of rights would necessarily provide the protection for which its advocates hope, and it would be foolish to ignore that the enactment of a bill of rights entails disadvantages which may well outweigh its benefits.

I should at the outset make clear what I mean by a bill of rights. In the strict sense, a bill of rights is a constitutional provision which protects individual rights from infringement by the legislature or the executive. It prevails over, and cannot be amended by, ordinary legislation. In that way it detracts from the sovereignty of the Parliament. Since a bill of rights is enforceable by the courts, it becomes the province of the courts, and not of the Parliament, to determine the nature and extent of the protected rights.

There may of course be variants of this model. For example, it may be provided, as it is in the Canadian Charter of Rights and Freedoms, that the Parliament may expressly declare in an Act of Parliament that the Act shall operate notwithstanding some of the provisions of the Charter, and that an Act in respect of which such a declaration is made shall have the same operation as it would have had but for those provisions in the Charter. Also a bill of rights may be enacted as an ordinary statute which is not constitutionally entrenched. That has been done in New Zealand. As I shall later mention, the enactment of a bill of rights as an ordinary statute of the Commonwealth Parliament would be as effective against the States as a constitutional amendment, and would further tip the federal balance in Australia steeply against the States.

I should immediately make the concession that I am in favour of constitutional guarantees which protect fundamental institutions and basic political rights--provisions, for instance, which entrench the independence of the judiciary, the right to vote and the bicameral nature of the legislature. It is true that the criticisms which I am about to make of guarantees of other rights apply with equal force to guarantees of constitutional and political rights. However, it is essential for the protection of those rights that it should not be possible for a political party which happens to control the legislature, perhaps temporarily and by a small majority, to make a significant change to any element of the Constitution without first having obtained the approval of the people, expressed either by referendum or at an election at which the party expressly sought a mandate to make that change. The surest way of protecting the essential elements of the Constitution is by preventing the legislature from interfering with them by ordinary legislation.

There are, of course, some arguments in favour of the adoption of a bill of rights. Mr Frank Devine advanced some of those arguments at the initial meeting of this Society. Although Australia has been notable for its freedom and tolerance throughout a century which has seen the most appalling violations of human rights elsewhere (often in countries which themselves have adopted bills of rights) there is concern that Australian governments do sometimes infringe rights which may be regarded as fundamental. There is no doubt that the power of the bureaucracy has grown considerably, with the potential to neglect the rights of the individual. It is true that a bill of rights would enable the courts to invalidate some statutory provisions and executive actions which would fail the test of compliance with the highest standard of human rights. I am not at all sure, however, that a bill of rights would enable the courts to check the worst abuses of political and bureaucratic power. It is unlikely to prevent a political party which had secured the requisite majority in the Houses of Parliament from stacking the courts and the public service, or from engaging in ruinous commercial ventures, or from subverting the conventions of the Parliament itself.

It is sometimes argued in favour of a bill of rights that individuals and minority groups who can never muster a majority in Parliament will not have the political power to protect their liberties. I am not convinced that experience in Australia shows that minorities suffer in this way--indeed, minorities sometimes form pressure groups which seem to have excessive influence--but it is true that the possibility of the neglect of minority interests is one argument in favour of a bill of rights.

The advocates of a bill of rights often point to the examples set by the United States and Canada, although how a consideration of the constitutional developments in the latter country should be useful, except as a warning, I am not sure. In the United States the Bill of Rights is very highly valued and is constantly enforced by the courts. Nevertheless I very much doubt whether the citizens of that great nation enjoy a greater level of freedom than we do in Australia.

Indeed, I am reminded of a story which Sir Arthur Fadden used to tell of an incident which occurred when he was representing Australia at the celebrations held at the inauguration of a West African nation, formerly a colony of Great Britain, which had just received its independence. The United States Secretary of State, who was also there, said rather patronisingly to a black man whom he saw standing nearby, "You must be very proud to have been granted your freedom". To which the black man replied, "I aint got no freedom. I'm from Alabama".

The Bill of Rights did not seem to inhibit the activities of Huey Long, who ruled Louisiana in a way that put the worst of some of our former State Premiers in the shade, or Senator McCarthy, who destroyed the careers of many writers and actors by his inquisition into their opinions. Constitutional guarantees may provide some protection to human liberties, but in the end freedom depends on the willingness of a community to defend it.

The existence of a bill of rights requires the judges to decide questions of policy which in a democracy should be decided by the Parliament. The judges may persuade themselves that in deciding questions of that kind they are giving effect to the will of the majority of the people, or that they are acting in accordance with current social values. However, they have no reliable means of determining what is the will of the people, and the values to which they give effect must necessarily be their own.

If a judicial decision which has been made as to the effect of a constitutional guarantee proves to be inconvenient, costly or contrary to the public interest, it can be corrected only by an alteration to the Constitution (which in Australia is difficult to achieve) unless the court reverses its decision. Whether or not it is desirable, it is certainly not democratic that decisions on matters of

social and economic policy should be made by unelected judges who are not accountable for their decisions except to their own consciences.

One of the gravest objections to the constitutional entrenchment of human rights is that constitutional provisions of this kind can lead to results which restrict the power of the Parliament in ways that are unnecessary and undesirable as well as quite unpredictable. If a bill of rights is to be effective, some of the rights which it seeks to protect must necessarily be defined in fairly general terms. Experience shows that an apparently clear provision of a bill of rights can be given a meaning which was quite outside the contemplation of those who framed the provision. The cases on the Bill of Rights in the Constitution of the United States provide a myriad of examples.

One clause of that Bill of Rights forbids any State to "deprive any person of life, liberty or property without due process of law". This clause, when enacted, had the desirable object of forbidding such things as the execution or imprisonment of a person without due trial, or the seizing of property by military or other authorities without legal sanction. However, over a period of many years the Supreme Court of the United States held that the clause invalidated statutes which were designed to achieve such apparently beneficial results as limiting the working hours of employment, fixing minimum wages for women, restricting commerce in goods made by child labour, and preventing the use of substandard materials in manufacture.2 In 1937, in one of the shifts of opinion which have not been unusual on that Court, that view of the clause was rejected,3 and since then it has been held to have the effect, which was equally far from the original intention of those who framed it, of governing the extent to which the States can pass laws forbidding abortion.4

Another swing of opinion, almost manic in its intensity, has occurred on the Supreme Court in the interpretation of the provision which prevents any State from denying to any person the equal protection of the laws. At one time it was held that this provision did not invalidate laws which prevented black people from giving evidence in any case in which a white person was involved, or render unlawful the refusal of a State court to admit women to the Bar, and that it did not render unlawful State legislation which excluded blacks from railway carriages reserved for whites.5 Of course, all this has changed. Since then the provision has been held to require the racial desegregation of schools6 and, for that purpose, to authorise the compulsory busing of pupils (some of whom did not want to be bused) to schools (many of which did not wish to receive them).6

While one can understand the social aims of these decisions, it is surely an arguable question whether those who were bused against their will, and the communities who unwillingly were forced to receive them, received the equal protection of the law. That, however, is not the point, which is that the provision was given an operation which was unpredictable, and so opposed by one section of the public that it led to disorder in the streets.

Another provision of the United States Bill of Rights provides that "Congress shall make no law.....abridging the freedom of speech or of the press". No doubt this provision has been beneficial in allowing the media in the United States to operate with a degree of freedom which is envied by the media in many other countries. On the other hand, it has afforded protection to actions of the most trivial kind. It has required the Supreme Court to decide whether it is lawful to prevent a student from wearing long hair braided in the Indian fashion, or to make it an offence to display an article depicting the United States flag with marks or drawings on it.8

Perhaps the most absurd and unlikely operation of the constitutional guarantee of free speech was the decision of the Supreme Court that a zoning ordinance under which live entertainment

was not permitted in a particular area abridged the freedom of speech of a storekeeper who wished to install a device which, when a coin was inserted, allowed the customer to see a nude woman dancing.9

On the other hand, the provision has not always prevented serious invasions of free speech. The Court has upheld the conviction of persons who protested against American military intervention in Russia after the Bolshevik revolution, and of others who expressed left wing socialist views.10 I have already mentioned Senator McCarthy. The Bill of Rights gave no protection to the victims of the House Committee on Un-American Activities, and Senator McCarthy's Committee during that period of recent American history which Lillian Hellman has called "scoundrel time".

The approach of the courts in Australia to those few guarantees that are contained in our Constitution shows that it would be too much to hope that the interpretation which our courts would give to a constitutional bill of rights would be more predictable. The words of section 92 of our Constitution, which provide that trade, commerce and intercourse among the States shall be absolutely free, could hardly be written in plainer language, but they have given rise to persistent disagreement, and have eventually led the High Court to give them a meaning which was arrived at only by disregarding a multitude of previous decisions.11

Section 80, which requires indictable offences to be tried by jury, has been held to mean that State laws which allow the accused to elect to be tried by a judge alone, or which permit a jury to bring in a majority verdict, cannot be applied to a trial on indictment for an offence against Commonwealth law.12 I do not intend to suggest that these decisions were wrong, but it may be strongly argued that they have prevented the development of the law in ways which have proved successful in practice elsewhere, and which the Parliaments were entitled to regard as desirable or even necessary.

There is a real danger that the provisions of a bill of rights that may seem appropriate today may prove to be positively harmful tomorrow. The United States Constitution provides some striking examples. That Constitution guarantees trial by jury in suits at common law where the amount in controversy exceeds $20, and goes on to provide that jury decisions shall be appealed only in accordance with the rules of the common law. Quite apart from the fact that the figure mentioned is ridiculously inappropriate today, the provision has had the effect of preventing the abolition of trial by jury in cases at common law, and the further effect that the law governing appeals from juries is frozen in the form that it had in the eighteenth Century. The United States Constitution also guarantees the right to keep and bear arms, and it seems right to say that this provision has contributed to the culture of violence that is so harmful to American society.

There can be no doubt that if we were to adopt a bill of rights in Australia there would be strong pressure to include provisions which give effect to opinions which are fashionable today but which in future may be rejected as mistaken. Some of the draft bills of rights that have already been prepared include provisions which guarantee the right to freedom from discrimination, on grounds which include language, marital and parental status and religious, political or ethical belief. Those who so fervently wish to outlaw discrimination seem to give little weight to the fact that a law which forbids one person to discriminate against another necessarily interferes with the first person's freedom of choice. Not everyone in the past has believed that it is wrong to discriminate on grounds such as those mentioned, and in spite of the committed views which some persons hold today it is impossible to say whether the same beliefs will be held in fifty years time.

Some of those draft bills of rights include, in addition to provisions from which the Parliament cannot derogate, and provisions which may be over-ridden by express declaration, provisions

which are intended to be only directory. Those provisions, which are modelled on the International Convention on Economic, Social and Cultural Rights, declare that every Australian has the right to social security, to an adequate standard of living, to employment, to leisure, to education and to a clean environment and ecologically sustainable development. It would be simpler to provide that everyone has a right to live in Utopia.

Although provisions of this kind are not intended to be used to invalidate any legislative, executive or judicial acts which are inconsistent with them, any experienced lawyer will know that it would be by no means beyond the ability of the courts, when deciding cases, to take those statements of principle into account in various ways with unforeseeable consequences. The recent decision in the Minister of State for Immigration and Ethnic Affairs v. Teoh13 illustrates one way in which this might be done.

An attempt to mitigate the possibly inconvenient consequences of enacting a bill of rights was made in Canada by providing that the rights and freedoms guaranteed by the Charter "are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". A provision of this kind has some advantages, but it entails the disadvantage that it introduces an additional test--and a complicated one14--for the validity of the legislation.

The arguments which I have been discussing do not apply with the same force to a bill of rights which is enacted as an ordinary law by a State legislature which can amend or repeal it by ordinary legislation. However, such a law tends to be regarded as having some sort of superior status, and legislators appear reluctant to repeal or amend a bill of rights, even if they have power to do so, because of the political consequences. We have already seen a reluctance to interfere with the provisions of the Racial Discrimination Act 1975, which to some extent operates as a bill of rights.

It seems to me that it is much more satisfactory to define rights clearly and precisely by detailed legislation rather than to guarantee so-called fundamental rights which are expressed in general terms. For example, a draft prepared by the Constitutional Commission in 1988, and a draft recently prepared by the Law Council of Australia for discussion (which I should add has not yet been adopted by the Law Council), both contain the statement, "Every person has the right to be secure against unreasonable search or seizure". This provision, like a similar provision in the United States Constitution, expresses a principle with which everyone would agree, but it leaves it entirely to the courts to decide in what circumstances a search or seizure should be held to be unreasonable. There have been innumerable decisions on the subject in the United States. Provisions of that kind may be compared with the detailed provisions of the Crimes Act and the Crimes (Search Warrants and Powers of Arrest) Act 1994, passed by the Commonwealth Parliament, which define in considerable detail the powers and duties of officers conducting a search. The comparative certainty of a law of that kind is to be preferred to a general statement of principle, however fine it may sound.

One disadvantage of a bill of rights, whether or not it is constitutionally entrenched, is that the courts in enforcing it tend to concentrate on the technical question whether there has been an infringement of a guaranteed right, rather than on the question of what justice requires in the circumstances. For example, in New Zealand a driver was convicted when a breath test showed an excess of alcohol in the blood, but the conviction was quashed because he had not been warned of his right to consult a lawyer.15 In the United States a person accused of murder told the police that he could take them to where the murdered child was buried, and he did so and the body was found, but the conviction was quashed because the accused had not been informed of

his right to consult counsel.16 In Ireland one Trimbole was detained for the purposes of extraditing him to Australia on numerous charges, some of which were of the utmost seriousness, but the court ordered his release on the ground that his detention was tainted because his original arrest was invalidly made.17 He could lawfully have been rearrested immediately, but he escaped before that could be done. Cases like this suggest that adherence to the letter of the law has been preferred to substantial justice.

It is notable that in the United States the reform of criminal procedure has lagged behind that of other developed common law countries. It may be that the existence of a Bill of Rights has lulled lawyers and politicians into the belief that the protection afforded by a Bill of Rights is adequate and that reform in other respects is unnecessary. Speaking generally--for the position varies from State to State--an accused person there is not entitled to see the evidence on which the grand jury committed him or her for trial. The judge sums up only on the law, so that the jury is given no assistance to sort out a set of facts which may be very complicated. Appeal courts cannot quash a conviction on the ground that the evidence was unsafe and unsatisfactory.

Reliance on the Bill of Rights does not make up for these deficiencies. On the contrary, it has the effect of dividing and prolonging criminal proceedings, and is one of the causes why convicted persons may spend up to twenty years on death row--something which itself is regarded as a serious breach of human rights.18 Moreover, the concentration on the infringement of rights creates a climate in which litigation flourishes and responsibilities are neglected. We see that tendency in Australia also.

A bill of rights, particularly one that has constitutional status, would tend to have the result that judges would be appointed not so much for their legal ability as for their political or ideological attitudes. When a court is empowered to give a final decision on important matters of social policy there is a great temptation to appoint judges whose views on those questions of policy are views of which the executive government approves. The circumstances surrounding some judicial appointments in the United States show that it has often been impossible to resist this temptation. Thus one of the essentials of a free society--an independent judiciary--tends to be weakened when the judges are given what virtually amounts to political power.

As I have already suggested, some of the objections that may be raised to a constitutional bill of rights do not have the same weight when the bill of rights is contained in a statute which the legislature is free to amend. However, a bill of rights enacted by the Commonwealth Parliament would be in a significantly different situation from a bill of rights enacted by a State Parliament. The power of the Commonwealth Parliament to enact a statute of that kind would largely depend on its power to make laws with respect to external affairs. The Commonwealth Parliament could not amend a statute containing a bill of rights which was passed to give effect to a treaty, if to do so meant that the statute no longer conformed to the treaty or went beyond it or was inconsistent with it. In other words, although the Commonwealth Parliament could repeal such a statute, its power to amend it would be limited.

There is an even more important reason why a bill of rights contained in a Commonwealth statute would have a vastly different significance from a bill of rights contained in a State statute. Under the Constitution, any State legislation which was inconsistent with a Commonwealth bill of rights would be inoperative. A Common- wealth bill of rights would be likely to have the effect of imposing extensive restrictions on the exercise of State rights and powers. However much inconvenience or damage might be shown to result, a State could not remedy the situation. We have already seen how State legislation, which would have extinguished the native title successfully claimed by the plaintiffs in Mabo v. Queensland (No.2)19 was held by a majority of

4 to 3, to be inconsistent with the Racial Discrimination Act.20 If the Commonwealth Parliament enacted a bill of rights in the wide terms of some of the existing drafts, the effect on the States would be serious indeed.

The very name--a bill of rights--has a persuasive sound. No advertising firm could suggest a more attractive title for a statute. Some persons advocate the enactment of a bill of rights because they are concerned to protect rights which everyone would support in principle, but which they fear governments are inclined to whittle away. Their concerns may be valid, but they may under-estimate the disadvantages which may flow from the declaration of rights in general terms. Others admit that they see a bill of rights as a means of transforming public attitudes, and of allowing the courts to rush in to effect social and economic change where Parliaments fear to tread.

There are others, I am sure, who rightly perceive that a bill of rights, enacted by the Commonwealth Parliament, would enhance central power. Anyone who wishes to preserve the position and powers of the States from further attrition will see the need to resist the enactment of such a law by the Commonwealth Parliament.

Endnotes :

1. Jeremy Bentham, Anarchical Fallacies, cited in De Smith, The New Commonwealth and its Constitution (1964), p.164.
2. Lochner v. N.Y. (1905) 198 U.S.45; Adkins v. Children's Hospital (1923) 261 U.S.525; Hamer v. Dagenhart (1918) 247 U.S.251; Weaver v. Palmer Bros. (1926) 270 U.S.402.
3. West Coast Hotel Co. v. Parish (1937) 300 U.S.379.
4. Roe v. Wade (1973) 410 U.S.113; Webster v. Reproductive Health Services (1989) 492 U.S.490.
5. Blyew v. U.S. (1872) 80 U.S.581; Bradwell v. The State (1873) 83 U.S. 130; Plessey v. Ferguson (1896) 163 U.S.537.
6. Brown v. Board of Education (1954) 347 U.S.483.
7. Swann v. Charlotte-Mecklenburg Board of Education (1971) 402 U.S.1; Columbus Board of Education v. Penick (1979) 443 U.S.449.
8. New Rider v. Board of Education (1974) 414 U.S.1097; Spence v. Washington (1974) 418 U.S.405.
9. Schad v. Mt. Ephraim (1981) 452 U.S.61.
10. Abrams v. United States (1919) 250 U.S.616; Debs v. U.S. (1919) 249 U.S.211; Gitlow v. N.Y. (1925) 268 U.S.652.
11. Cole v. Whitfield (1988) 165 CLR.360.
12. Brown v. The Queen (1986) 160 CLR.171; Cheatle v. The Queen (1993) 177 CLR.541.
13. (1995) 69 ALJR 423.
14. The Queen v. Oakes (1986) 26 DLR (4th) 200.
15. M.O.T. v. Noort (1992) 3 NZLR 260.
16. Brewer v. Williams (1977) 430 U.S.387. He was convicted on other evidence after a new trial; Nix v. Williams (1984) 81 Law Ed. (2nd) 377.
17. The State (Trimbole) v. Governor of Mountjoy Prison (1985) IR 550.
18. Soering v. U.K. (1989) 11 EHRR 439; noted 68 ALJ 453; and see Pratt v. Attorney-General for Jamaica (l994) 2 A.C.1.
19. (1992) 175 CLR 1.
20. Mabo v. Queensland (1988) 166 CLR.186.