

AN AUSTRALIAN RIGHTS COUNCIL

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I A BILL OF RIGHTS?

Australians have long debated the adoption of a Bill of Rights, both at Commonwealth and State level. As the recent report of the New South Wales ('NSW') Legislative Council's Standing Committee on Law and Justice demonstrates, there is broad agreement that greater attention ought to be given to the compatibility of Australian (Commonwealth, State and Territory) law with fundamental principles of human and civil rights and freedoms recognised by the common law and international human rights instruments (treaties and declarations).¹ The common law is subject to legislation; so while its principles can be employed by judges to endeavour to interpret legislation compatibly with the common law (including international human rights principles incorporated therein)² the common law offers no protection against unambiguous legislation which trenches upon fundamental rights. Hence, it would be valuable to have some standard, some principles enjoying broad support (if not a consensus), against which to evaluate legislation, or at least future proposed legislation.

The difficulty is that there is a wide disparity of views as to how such a desirable objective can be achieved; indeed, whether it can be without introducing a detriment which outweighs the benefits, namely an imperial, or at least politicised, judiciary. A constitutional Bill of Rights introduced into the *Australian Constitution* ('Constitution') through s 128 would obviously offer the greatest protection of rights and freedoms but, unless it resulted merely in a judicial declaration of 'incompatibility',³ the difficulty of amending such a Bill of Rights once introduced could eventually lead to inflexibility in public policy, possible obsolescence of rights, and judicial imperialism, even if it included provisions such as the Canadian 'override clause'.⁴ Moreover, the prospects of securing referendum approval for the introduction of such a Bill of Rights are

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1 New South Wales Legislative Council Standing Committee on Law and Justice, *A NSW Bill of Rights*, Report No 17 (October 2001), especially ch 5.

2 See, eg, *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (Brennan J, Mason CJ and McHugh J concurring).

3 Cf *Human Rights Act 1998* (UK) s 4.

4 *Canadian Charter of Rights and Freedoms 1982* s 33.

minimal, in view of the inevitable controversy it would generate, regarding both what was included and what omitted. One has only to imagine the debates over abortion, same-sex marriage and adoption, rights to in vitro fertilisation ('IVF') treatment, capital punishment, and rights to strike and not join a union to see what an impossible 'can of worms' would be opened by such a proposal. Moreover, these are only current issues. The future is bound to raise controversies presently unforeseeable.

A statutory Bill of Rights at State level offers greater flexibility since it could be amended more easily, unless, of course, it was entrenched by a 'manner and form' provision. An unentrenched statutory Bill of Rights could be employed by the courts to interpret legislation, and perhaps even provide damages for breach.⁵ It could also constrain the executive government and other public authorities, and even private bodies (such as corporations) and individuals. But it could be avoided by inconsistent legislation, although it could probably be protected by a 'manner and form' provision which ensured that inconsistent legislation must expressly declare that it is to operate notwithstanding the Bill of Rights.⁶

The Commonwealth could enact a statutory Bill of Rights to govern the conduct of Commonwealth and Territory executives and the interpretation of Commonwealth and Territory legislation, and it could possibly be 'entrenched' to the extent of requiring inconsistent legislation to provide expressly that it is to operate notwithstanding the Bill of Rights.⁷ Such a statutory Bill of Rights could be enacted pursuant to ss 51(xxxix) and 122 of the Constitution. However, if a Commonwealth Bill of Rights were to apply to the States and/or private corporations and individuals, it would need to rest on other powers, especially the 'external affairs' power (s 51(xxix)), which would require that the provisions of the Bill of Rights complied with the provisions of an international treaty ratified by Australia. This would exclude a Bill of Rights modelled on the *Canadian Charter of Rights and Freedoms* 1982 or the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,⁸ which are generally considered preferable to the *International Covenant on Civil and Political Rights* ('ICCPR'),⁹ which the Commonwealth could implement under its 'external affairs' power. A Commonwealth Bill of Rights which applied to State legislation¹⁰ would render inconsistent State legislation inoperative pursuant to s 109 of the Constitution. So far as the States were concerned, it would therefore operate similarly to a constitutionally entrenched Bill of Rights.

5 See *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) ('Baigent's Case').

6 See *Australia Act 1986* (UK) s 6 and *Australia Act 1986* (Cth) s 6; Winterton, below n 7.

7 See George Winterton, 'Can the Commonwealth Parliament Enact "Manner and Form" Legislation?' (1980) 11 *Federal Law Review* 167, 182-9, 190-1, discussing (inter alia) *R v Drybones* [1970] SCR 282.

8 Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

9 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

10 For example, the draft statutory Bill of Rights circulated by the Hawke Government (Attorney-General Senator Gareth Evans) in 1984, as contrasted with the Australian Bill of Rights Bill 1985 (Cth) (introduced by Attorney-General Lionel Bowen), which would have applied only to Commonwealth legislation. See NSW Legislative Council Standing Committee on Law and Justice, above n 1, [3.10]-[3.11].

II NON-JUDICIAL ENFORCEMENT

The constitutional and statutory Bills of Rights considered above would probably be interpreted and enforced by the courts, although the Bill of Rights could limit the degree to which the courts were involved subject, of course, to constitutional limitations, such as the requirement that the judicial power of the Commonwealth be vested only in courts envisaged by Chapter III of the Constitution. However, judicial enforcement is the principal hurdle to adopting a Bill of Rights, assuming, of course, that agreement on its content could be achieved. There are three main disadvantages in leaving enforcement to the courts. First, and most important, is that application of a Bill of Rights frequently requires balancing competing rights: the mother's right to an abortion versus the right to life of the foetus and the father's right to parenthood; the defendant's right to a fair trial versus freedom of the press; free exercise of religion versus equality; non-establishment of religion versus freedom of speech, and so on. The balancing of these rights can rarely adequately be achieved merely by neutral principled reasoning, which is what an ideal judiciary offers. It requires the input of community values, policy and public opinion; in other words, *political* considerations, which should be tailored to each application, and may vary over time. It may, for example, be preferable to resolve issues such as the appropriateness of reverse discrimination differently – even inconsistently – for different groups, different situations, and different times. The political process subject, ultimately, to the ballot box is a more appropriate mechanism for resolving such dilemmas than the blunt neutrality of courts. Secondly, judicial enforcement of a Bill of Rights inevitably leads to avoidance of responsibility and 'buck-passing' by the political branches. This is undesirable on many grounds: judicial enforcement is costly; it may be long delayed, with much damage caused before redress is achieved; and many issues are non-justiciable or simply cannot come before the courts. Hence, it is important that the political branches not shirk their responsibility to assess the compatibility of their actions with fundamental human rights principles. Thirdly, it is certainly arguable that 'an increased politicisation of the Judiciary, and particularly the judicial appointment process, is an inevitable consequence of the introduction of a Bill of Rights'.¹¹

It has, accordingly, been suggested that 'Parliament [should] become a more effective guardian of human rights rather than handing over this role' to the courts.¹² The NSW Legislative Council's Standing Committee on Law and Justice has proposed a parliamentary joint House committee, modelled on the Senate's Scrutiny of Bills Committee, to examine draft legislation prior to enactment for compliance with human rights standards, such as the *ICCPR*.¹³ However, while (obviously) preferable to the complete absence of pre-enactment review, such committees suffer from considerable constraints: time pressure;

11 NSW Legislative Council Standing Committee on Law and Justice, above n 1, xiii.

12 *Ibid* xiv.

13 *Ibid* ch 8.

lack of expertise, only partly ameliorated by the employment of external experts; the difficulty of building up a coherent body of jurisprudence over time; and the ultimate subjection of its work to the vicissitudes of politics. The Senate's Standing Committee on the Scrutiny of Bills, for example, 'expresses no concluded view on whether any provisions offend against its principles or should be amended'.¹⁴ Any proposed amendment of a Bill pursuant to the Committee's report must be moved by a senator, and adverse comments in Committee reports have been ignored for political reasons. Such committees exist in the Senate and in Victoria and Queensland, and a similar committee has now been recommended for NSW. But parliamentary review of proposed legislation is not an effective substitute for judicial enforcement, and will not halt the continuing pressure to follow Canada, New Zealand and now the United Kingdom by introducing a Bill of Rights enforced by the courts.¹⁵ If Australian Parliaments are unwilling to reduce their adherence to parliamentary supremacy, they may in time find themselves overwhelmed by public pressure for a judicially enforceable Bill of Rights.

III AN AUSTRALIAN RIGHTS COUNCIL

A parliamentary committee does not adequately balance parliamentary supremacy with judicial enforcement of rights; the balance falls too heavily on Parliament's side. But an alternative compromise is possible. It would combine the following elements: pre-enactment review by an independent, but non-judicial, expert body able to build up a substantial body of human rights jurisprudence, whose reports could not be ignored, either as a matter of law (in the States) or because of the body's prestige (in the Commonwealth). Such a body, here called a 'Rights Council' and loosely modelled on the French *Conseil Constitutionnel*, would protect rights and freedoms through pre-enactment, abstract, quasi-judicial review. Because the constitutional position differs between the Commonwealth and the States, the proposed operation of the Rights Council in the States will be described first.

The Rights Council would ideally comprise five members who should be former judges of an Australian superior court of record or acknowledged experts in constitutional law. Serving members of Parliament, public servants and judges would be ineligible. To ensure their acceptability to both sides of politics, Rights Council members should be elected by a two-thirds majority of each House of Parliament or, perhaps, a joint sitting of both Houses in bicameral legislatures. (Germany provides a precedent, since judges of its Federal Constitutional Court

14 Harry Evans (ed), *Odgers' Australian Senate Practice* (10th ed, 2001) 379.

15 See *Canadian Bill of Rights* 1960 (Canada); *Canadian Charter of Rights and Freedoms* 1982; *New Zealand Bill of Rights Act* 1990 (NZ); *Human Rights Act* 1998 (UK).

are elected by two-thirds parliamentary majorities.¹⁶) The members of the Rights Council should elect their chair. A new Rights Council should be elected for each Parliament. Rather than each of the nine Australian jurisdictions having its own Rights Council with possibly divergent interpretations but no superior authority (like the High Court of Australia ('High Court') in judicial matters) able to impose uniformity and consistency, it would be highly desirable for the Commonwealth and the States and Territories to pool their legal resources and jointly establish one national Australian Rights Council comprising five members, two elected by the Commonwealth Parliament (by a two-thirds majority at a joint sitting of both Houses) and three chosen by the State and Territory Parliaments. Since both sides of politics will usually enjoy majorities in various Houses of those Parliaments, election by simple majorities should suffice to necessitate bipartisanship, especially as securing two-thirds majorities in eight Parliaments with 13 legislative Houses may prove unwieldy. It is envisaged that the six States and two self-governing Territories would agree upon three suitable members. A national Rights Council would, of course, require a specified term of office, say five years, perhaps renewable only once. Compulsory retirement at the age of 70 would be appropriate.

The Rights Council would examine the compatibility of proposed legislation with the relevant Bill of Rights. However, the establishment of a Rights Council is not conditional on the enactment of a Bill of Rights, since the Council could be empowered to examine proposed legislation by reference to international human rights instruments, whether or not legislatively incorporated into Australian domestic law. The Council would report on the compatibility of the proposed legislation after a quasi-judicial hearing in which arguments for and against were addressed to the Council, preferably by legal counsel (although others should also be entitled to address the Council), and the Council should also suggest possible amendments to ensure compatibility with the Bill of Rights (or international instruments). Ideally, the Rights Council would examine Bills just prior to enactment, when parliamentary consideration had essentially concluded. Hence, the appropriate point would be after the Bill's second reading in the second House (in bicameral Parliaments). The Council should, likewise, examine any Bills amended pursuant to an earlier Rights Council report. The operation of a Rights Council is, of course, entirely compatible with a complementary parliamentary committee, such as the Senate's Scrutiny of Bills Committee or the joint House committee recently proposed for NSW. Indeed, it would be desirable for Bills reaching the Rights Council to have received the fullest possible consideration both as to policy and compliance with human rights and freedoms.

The role of the Rights Council would be strongly influenced by the provision made for referring proposed legislation for evaluation. The effectiveness of the

16 The Federal Constitutional Court ('FCC') comprises two 'Senates', each of eight judges. Half the members of each Senate are elected by each legislative House. The Lower House (*Bundestag*) elects FCC judges by a two-thirds majority of its 12 member Judicial Selection Committee, which is elected by proportional representation; the Upper House (*Bundesrat*) elects FCC judges by a two-thirds majority vote: *Federal Constitutional Court Act 1951* (Germany) arts 2, 5-7 (as amended).

Conseil Constitutionnel, for example, was greatly augmented when 60 members of either legislative House (the National Assembly and the Senate) were empowered to refer legislation (prior to promulgation) to it in 1974. The power had previously lain only in the President of the Republic, the Prime Minister and the Presidents of the two Houses.¹⁷ (The French National Assembly presently comprises 577 members and the French Senate 321 members.) It seems desirable to allow very liberal standing to refer Bills to the Rights Council. Hence, the power could be given to every member of the relevant Parliament. If this be considered too liberal, following the French example the power could be given to the Prime Minister, Premier or Chief Minister, the Speaker of the Lower House, the President of the Senate or Legislative Council and, say, five members of a legislative House. This would ensure that the opposition and, probably, a substantial third party (such as the Australian Democrats), especially if supported by some Independent members of Parliament, would be able to refer Bills. Non-members of Parliament who would be directly affected by the proposed legislation and would have standing to challenge it in court (after enactment) were the Bill of Rights (or the international instruments) judicially enforceable ought, in principle, to be empowered to refer a proposed law to the Rights Council. However, if this be considered inappropriate, because it would tend to make the Rights Council too analogous to a court (and thus effectively move it from the legislative to the judicial branch of government), interested non-members of Parliament should, at least, be empowered to intervene in hearings of the Council, subject to obtaining the Council's leave. Provision might also be made for those analogous to *amici curiae* to assist the Rights Council, subject to obtaining its leave to do so.

Decisions of the *Conseil Constitutionnel* are binding; legislation declared unconstitutional cannot be promulgated.¹⁸ The States would have the power to confer similar power on the Rights Council, but that would effectively bring many of the disadvantages of a judicially-enforceable Bill of Rights, except that the State's actual judiciary would not be affected. The Rights Council would, in effect, operate analogously to a European constitutional court, except that its review function would be abstract (that is, it would not determine actual 'cases or controversies' or 'matters')¹⁹ and would be confined to review pre-enactment. However, the French position should not be followed in this respect. If decisions of the Rights Council were binding, the balance would fall too heavily against parliamentary supremacy. Instead, adapting a provision of the *Constitution of the United States of America*, Parliament should be empowered to override adverse reports of the Rights Council and enact provisions declared incompatible with the Bill of Rights (or international human rights instruments) provided a two-thirds majority in each House agrees.²⁰

The Commonwealth Parliament should also implement the Rights Council proposal, preferably as a component of a national Australian Rights Council. The

17 *Constitution of France* art 61.

18 *Constitution of France* art 62.

19 Employing, respectively, United States and Australian terminology.

20 Cf *Constitution of the United States of America* art I § 7(3) (overriding presidential veto).

Commonwealth Parliament could provide for pre-enactment review of Bills pursuant to ss 50(ii) and 51(xxxix) of the Constitution, provided that the Rights Council's role preceded passage by the relevant House. But the Commonwealth Parliament (unlike State Parliaments) could not require Bills which had been passed by both Houses (or by a joint sitting under s 57 of the Constitution) to be approved by the Rights Council prior to enactment, since that would contravene s 1 of the Constitution, which vests the legislative power of the Commonwealth in a Parliament comprising the Queen, the Senate and the House of Representatives. Unlike the States, the Commonwealth could not make submission of Bills for the Royal Assent conditional upon the prior approval of the Rights Council.²¹ Moreover, again unlike the States, the Commonwealth Parliament, or either of its Houses, could not require a Bill (for example, one which the Rights Council had held to be incompatible with the Bill of Rights or human rights standards) to be passed by a super-majority because ss 23 and 40 of the Constitution provide that 'questions arising' in the Senate and House of Representatives, respectively, 'shall be determined by a majority of votes', 'majority' here meaning a simple majority.²² Hence, without a constitutional amendment, a Rights Council could be given no greater than a merely advisory role in regard to Commonwealth Bills.²³ However, such a function would nevertheless be a valuable one; a negative report by an Australian Rights Council comprising several retired High Court justices, for example, would be politically difficult to ignore. Its reports would clearly have greater weight than those of a committee of parliamentarians, even if assisted by external expert advice.

IV CONCLUSION

The Rights Council proposal is surely worthy of implementation, at least initially in one Australian jurisdiction, even if only on a trial basis, subject to a 'sunset clause'. It need not await the enactment of even a merely statutory Bill of Rights, since the Rights Council could be empowered to determine the compatibility of proposed legislation with international human rights treaties or other instruments. The Rights Council proposal could operate in conjunction with a committee of parliamentarians. Indeed, it is desirable that it should, but experience suggests that the latter alone is an insufficient protector of rights and freedoms. The establishment of a Rights Council would constitute a minimal first step towards extra-parliamentary protection of the broad range of rights and freedoms usually protected by Bills of Rights.

21 See Winterton, above n 7, 192.

22 See *ibid* 191.

23 A remote precedent already exists in the power of the Human Rights and Equal Opportunity Commission to examine proposed enactments, when requested to do so by the minister, to ascertain whether they 'would be inconsistent with or contrary to any human right', and report thereon to the minister: *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 11(1)(e). See generally David Kinley, 'Human Rights Scrutiny in Parliament: Westminster Set to Leap Ahead' (1999) 10 *Public Law Review* 252, 253, referring also to the *Human Rights Act 1993* (NZ) s 5(h)(iii).

Moreover, apart from protecting rights and freedoms, the Rights Council could fulfil a valuable function as auditor of the legislature's compliance with human rights principles. Instead of relying on a few notorious breaches of human rights²⁴ and impressionistic assessment of the common law's effectiveness as a protector of rights and freedoms,²⁵ the legislature's record of compliance with the carefully reasoned reports of the Rights Council would provide concrete evidence on which to base an informed assessment as to the necessity of enacting a judicially enforceable Bill of Rights.

24 See, eg, NSW Legislative Council Standing Committee on Law and Justice, above n 1, [5.17].

25 Cf *ibid* [5.23]-[5.31].