

Discussion Paper:
A Bill of Rights for Australia?

Introduction

In recent months, State and Federal judges¹, politicians, academics² and the press have commented on the desirability of a Bill of Rights for Australia. At a Federal level, the Australian Democrats have foreshadowed the introduction of a draft Bill into Federal Parliament. In December 1993, the Australian Capital Territory Attorney General's Department published a detailed issues paper entitled *Bill of Rights for the ACT?*³ seeking community discussion on the subject.

The debate about a Bill of Rights is at an embryonic stage. Whether it proceeds to mature is speculation. However, there is no doubt that the debate will continue in the wider community in some form. That being so, this paper attempts to identify some prominent issues to facilitate a discussion of them by Conference.

Definitions

1.1 *What is a Bill of Rights?* A Bill of Rights is the formal enumeration and codification of specific rights which individuals of a community, and the community itself, uphold as basic. A Bill of Rights seeks to preserve and/or to extend rights of persons in civil society.³ According

¹ See Mr. Justice Young of the Supreme Court of New South Wales, Editor of the *Australian Law Journal*, "Australian charter of rights," *Australian Law Journal* 67 (Nov.1993) 807-08.

² E.g. R. Cullen, "Does Australia need a Bill of Rights?" *Law Institute Journal* 67 (Jan.1993) 71.

³ Ideally, particularly in the natural law tradition, a Bill of Rights is an attempt to define and to protect the conditions necessary for human flourishing. See, e.g. J. Maritain, *Christianity and Democracy & The Rights of Man and Natural Law*, (trans. D.C. Anson) (San Francisco: Ignatius Press, 1986); J. Finnis, *Natural Law and Natural Rights*, (Oxford: Clarendon Press, [reprint] 1986); J. Joblin & W. Kasper, *Human Rights and the Church: Historical and Theological Reflections*, (International Colloquium 14-16 November, 1988) (Vatican City: Pontifical Council for Justice and Peace, 1990); Y.R. Simon, *The Natural Law Tradition - A Philosopher's Reflections*, (ed. V. Kuic) (New York: Fordham University Press, 1965, 1992). More generally, see *Law and the Ordering of Our Life Together*, (ed. R.J. Neuhaus) (Grand Rapids, MI: Eerdmans, 1989).

to some, a Bill of Rights could deter Parliament from abrogating the rule of law, and could deter Parliament from overriding the rights of minorities and individuals.

- 1.2 *Entrenched or Non-entrenched?* Formally, a Bill of Rights can be "entrenched" or "non-entrenched", or in the form of a charter of rights. An entrenched Bill of Rights is one which usually requires adoption or alteration by referendum. A non-entrenched Bill of Rights would be able to be adopted or amended by the ordinary processes of Parliament and would not require a referendum.
- 1.3 *What is a Charter of Rights?* A Charter of Rights is a document which provides more of a 'touchstone' of basic principles to which reference can be made, notably by courts, to determine certain kinds of rights. It does not, of itself, have any independent legal force. In effect, it is a statement of standards.
- 1.4 *A Bill of Rights & the Constitution.* A constitutionally entrenched Bill of Rights would have legal authority equal to the Constitution: like the Constitution, it would be an instrument of paramount law. A non-entrenched Bill would not. A Charter of Rights would not, and could not, supplant or compete with the operation of the Constitution. However, a Charter could become an active legal instrument because it could be used as a point of reference for decision-making in a broad range of areas on which the Constitution, or legislation, was silent or deemed inadequate by the judiciary. *A fortiori* would this be the case with a Bill of Rights, entrenched or non-entrenched.

Issues

- 2.1 *From Where Do Rights Come?* A distinction should be made between rights which the state has authority to confer (e.g. the right of citizenship), and fundamental rights of human beings.

⁴ See the Chief Justice of the High Court of Australia, Sir Anthony Mason's discussion, "A Bill of Rights for Australia?" (1989) 5 *Australian Bar Review* 79-90. The Chief Justice has suggested elsewhere that persons generally, and perhaps minority groups in particular, would be better protected by the courts than by the legislature. His comments in this regard should not be taken as a necessary endorsement of a Bill of Rights *per se* because the interpretation of any law - be it at common law, statutory or in a Bill of Rights - is a matter for the judiciary. See the editorial of the *Sydney Morning Herald*, "High Court for human rights," 17th March, 1994, p.12 where Mason CJ is quoted as saying, "the protection of rights of the individual is better left to judges than politicians." The same remarks were reported in *The Australian* on 16th March, 1994, p.1.

The latter are inherent of every person, such as the right to life, and are not bestowed by governments. Inherent, fundamental rights may find expression in rights recognised and defined by courts and the legislature but which may, over time, be circumscribed by those same organs of the state.⁵

2.2 *Limitation of Rights by Definition.* A frequent objection to a Bill of Rights is that, in specifying particular rights, it makes them prior to rights which, for whatever reason, it omits. At the same time, it petrifies the rights which it does specify, in terms which may, in time, prove inadequate.

2.3 *Categories of Rights.* Within instruments of this kind, there are usually different categories or classes of rights. For example, civil and political rights would include the right to vote, the right to freedom of assembly and freedom of expression. Among economic, social and cultural rights would be the right to nutrition, health and education.⁶

2.4 *Is There a Hierarchy of Rights?*

(i) In 1983, the International Theological Commission prepared a paper entitled "Propositions on the Dignity and Rights of the Human Person." In the course of that document, the Commission referred to a hierarchy of human rights saying that for some, religious liberty is the most foundational of rights, while for others, the equality of all persons is pre-eminent.⁷

⁵ For an example of how legislatures have determined a right and the courts have interpreted its operation restrictively, see below 2.4 and footnote 13.

⁶ As to rights generally, note the comment of the famous British lawyer, Sir William Blackstone, who said that the three great rights of life, liberty, and property, are nothing more than the *residuum* of natural liberty - the part that was not required to be sacrificed to public convenience. He continued, "The principal aim of society is to protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature." *Commentaries on the Laws of England*, Bk.I,129 & 124.

⁷ International Theological Commission, "Propositions on the Dignity and Rights of the Human Person," in *International Theological Commission: Texts and Documents, 1969-1985*, (ed. M. Sharkey) (San Francisco: Ignatius Press, 1989) 251-66; see especially Section 1.2, "The Hierarchy of Human Rights." Logically, these rights are predicated on the right to life.

(ii) Some fundamental rights have clashed. For example, in the United States, the right to life of the unborn child has been pitted against and subordinated to the right of the mother to determine and to exercise authority over her own body. This result was not prevented by the existence of a Bill of Rights.⁸ Australia has achieved the same result without a Bill of Rights. In both instances, judges were the final arbiters.

3.1 *Rights in Australia.* Under the current Australian Federal and State *parliamentary system*, certain rights are protected by specific legislation. Under the Australian *legal system*, certain rights are determined and protected according to common law principles of interpretation and decided according to precedent established by case law. The common law, of course, always has the potential to develop judicial responses to rights and needs not otherwise met by the legislature.¹⁰ There has been some tendency in recent times, notably in *Mabo Title Case*, for courts to refer to international instruments as general points of reference where it is thought there is a lacuna in either the common law or statute law.¹¹ Sir Anthony Mason has said in a recent address which advocates a more expansive role for courts and broader bases upon which decisions are made, that "...the principles of both statute law and judge-made law are expressed, to a greater extent than before, in terms of standards rather than strict rules."¹²

⁸ The history of the judicial path which culminated in the *Roe v. Wade* decision of the United States Supreme Court legalising the right to terminate the life of children *in utero*, is succinctly set out by Mary Ann Glendon in her *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991) 58-60. For a discussion of the same issue in other countries, see Glendon's *Abortion and Divorce in Western Law* (Cambridge, MA: Harvard University Press, 1987).

⁹ See, e.g. B. Fisse, *Howard's Criminal Law*, (Fifth Edition) (Sydney: The Law Book Company, 1990) 165-68; S. Laufer (ed.), *Law for the Nursing Profession and Allied Health Care Professionals*, (2nd Edition) (Sydney: CCH Australia Limited, 1992) 107-13.

¹⁰ Usually, such development has been slow and with some circumspection. Cf. Tennyson's observation:

..Freedom broadens slowly down
From precedent to precedent;
From *You Ask Me Why* vv.11-12.

¹¹ See the address by Mr. Justice Kirby, President of the New South Wales Court of Appeal, "The United Nations Convention on the Rights of the Child and the Declaration of the Rights of the Child as Part of International Law and Municipal Law," *First World Congress on Family Law and Children's Rights*, 6th July, 1993.

¹² "The Australian Judiciary in the 1990s," an address to The Sydney Institute, 15 March, 1994.

3.2. *Roles of Politicians and Judges*

(i) A Bill of Rights would likely shift greater power to [unelected] judges who would be free to interpret cases by reference to precedent and/or to a Bill or Charter of Rights. However, some politicians, although posturing to protest at such a shift but unwilling (or unable) to deal with specially sensitive issues, might prefer the judiciary, in effect, to decide "hard cases" where a political/ legislative solution is not possible or just too difficult.¹³

(ii) Some commentators have suggested that the High Court, in judgments like the *Native Title Case*, has moved increasingly in a direction so as to read into the Constitution, or to find by reference to principles and instruments of international law, an implied Bill of Rights.¹⁴ Accordingly, so it is said, it would be prudent to define rights more specifically - but not necessarily conclusively - in a separate Bill rather than to have the High Court pronounce intermittently on what rights might be found in the Constitution. The adoption of a Bill of Rights would result in a correlative shift away from the role of the legislature and the protection of particular rights by specific and individual pieces of legislation. Such legislation would still be possible but would be interpreted in the light of a Bill or Charter of Rights.

¹³ A good example of this is the position concerning abortion in certain States in Australia (Queensland, New South Wales and Victoria) where, as a matter of statute law, abortion is illegal, but under the common law, exceptions have been developed to allow it. See the references cited in footnote 9 above, and K.A Petersen, *Abortion Regimes*, (Aldershot: Dartmouth, 1993), Chapter 6 "The 'Judicial' Model," pp.129-48. Generally, see Mason CJ's comments 'Judges deciding Political Questions' in "A Bill of Rights for Australia?" *ibp. cit.*, at pp.82-83.

¹⁴ See e.g. P. Creighton's commentary on a number of recent High Court decisions dealing with the right and source of certain freedoms of speech and the Constitution, "The implied guarantee of free political communication," *University of Western Australia Law Review* 23 (July, 1993) 163-72. Note again Mason CJ's remarks:

Sometimes judicial initiative is inevitable....It is no longer feasible for courts to decide cases by reference to obsolete or unsound rules which result in injustice and await future reform at the hands of the legislature. There is a growing expectation that courts will apply rules that are just, equitable and soundly based except in so far as the courts are constrained by statute to do otherwise.

He concluded his address with a series of questions, the last of which was:

What role are we prepared to assign to judges? For example, are we prepared to give them a jurisdiction to enforce a Bill of Rights, a jurisdiction exercised by courts in all major common law countries except Australia and the United Kingdom?

"The Australian Judiciary in the 1990s" *ibp. cit.*

- 3.3 *The Overseas Experience* The introduction of a "Charter of Rights and Freedoms in Canada" has resulted in a proliferation of cases before the courts and a consequent lengthening of time before a judgment is delivered. It has also caused problems for the administrative arm of government.¹⁵
- 4.1 *Community Education* A Bill of Rights, and/or a discussion about it, could have a positive, educative value in the community: for example, to alert people to the origins and nature of different kinds of rights and to deficiencies in certain classes or types of rights. It could promote also a discussion about the kinds of institutions Australian society should have and the accountability of those institutions, including the bureaucracy, to the community
- 4.2 *A Fashionable Topic?* It could be that the current discussion about a Bill of Rights is but part of fashionable, passing legal and political discourse which may be overtaken by the next pressing item on either of these agendas. The Federal Government has said that it has no intention of pursuing a Bill of Rights.¹⁶

Other Matters

¹⁵ Quoting others, Frank Brennan SJ notes that since 1990, there have been more than 4000 charter cases in Canada; he cites Professor Hammond in the following terms: "...[the Canadian Charter has placed] an extraordinarily heavy burden on Government and government departments who have the very difficult task of trying to ascertain what is presently in conformity with the charter and what is not." R.G. Hammond, "The Bill of Rights and the Canadian experience," April 1987 *New Zealand Law Journal* 132 at p.133. F. Brennan SJ, "Catholic Social Teaching and Contemporary Australian Proposals for Bills of Rights," 1993 *Newman Lecture* Mannix College, Monash University.

¹⁶ The Federal Government's position on a Bill of Rights was detailed most recently by Senator Bolkus in answer to a question by Senator Spindler following the reported comments of Sir Anthony Mason mentioned above: Senate *Hansard*, 16 March, 1994, pp.1715-16. Senator Bolkus said: "...the government has no plans at this stage to seek to amend the constitution to enshrine a bill of rights, or indeed to follow the Canadian example and enact a legislative bill of rights. ...The government recognises the importance of a bill of rights and its importance in providing a means for protecting and advancing the human rights of individuals." The Senator went on to point out that apart from a range of domestic tribunals, such as the Human Rights and Equal Opportunity Commission, aggrieved citizens had recourse to international bodies established under various international instruments. Thus, there was no need, in his view, for a bill of rights.

- 5.1 The Church is often stereotyped as being concerned with only a few issues (abortion and other "life issues"). Can these issues be ventilated in discussions about a Bill of Rights without shifting focus from either the importance of these single, critical issues, or from the discussion about a Bill of Rights *per se*?
- 5.2 A political/constitutional/ethical consensus will be very difficult to achieve in a pluralist and multicultural society. Equally, within the Catholic community in Australia, there will be a wide range of views as to a Bill of Rights and in relation to specific rights which such an instrument would seek to protect and/or advance.
- 5.3 Can it be said that the Church in Australia has, or ought to have, a defined and settled position in relation to a Bill of Rights generally? Would the Church be better served preparing its own charter of human rights and presented in a form similar to the Holy See's *Charter of the Rights of the Family*? Would a productive and arm's-length approach to the Bill of Rights issue(s) be the preparation and dissemination of a series of information and/or discussion papers on selected topics?

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