RECOGNISING UNIVERSAL RIGHTS IN AUSTRALIA

THE HON DARYL WILLIAMS AM QC MP*

I INTRODUCTION

One of the great achievements of the world community in the 20th century was that it was able to put aside numerous differences and recognise, on more than one occasion, that there are certain rights which should be enjoyed by all people, everywhere.[1] Despite myriad differences in culture, politics, religion and history, nations have managed to agree upon these common standards. At the same time, the means adopted to recognise and protect these rights is less than universal. Nations have their own institutions and procedures for the domestic recognition and protection of rights. Some countries have experimented with more than one method of protecting rights during the last century.

Thus, while the language of human rights has universal currency, its practical value is determined to a large extent by domestic arrangements. Indeed, history suggests that, regardless of how and where rights are expressed, they are likely to be meaningless if they are not supported by free and democratic domestic institutions such as an elected legislature, an independent judiciary and a free press.[2] Achieving the best means for recognising and protecting human rights in Australia is a continuing challenge. We should not be afraid to compare our record or our system of human rights protection with that of other nations.

---

* Commonwealth Attorney-General. The Attorney-General is indebted to Mr Jeffrey Murphy of the Attorney-General's Department for his work on this article. Responsibility for the views expressed is with the Attorney-General.

1 The *Universal Declaration of Human Rights*, GA Res 217A, 3 UN GAOR (183rd plen mtg), UN Doc A/Res/217A (1948). The *Universal Declaration of Human Rights* was agreed to by the United Nations General Assembly in 1948 without any dissenting votes (there were eight abstentions). The *Convention on the Rights of the Child*, opened for signature 20 November 1989, ATS 1991 No 4 (entered into force 2 September 1990), was adopted in 1990 and has been ratified by all but two signatory nations.

2 See, eg, Sir Harry Gibbs, 'A Bill of Rights' [1994-1995] *Australian International Law Journal* 3.

II RECOGNITION OF RIGHTS AND RESPONSIBILITIES IN THE CONSTITUTION

The *Australian Constitution* ('Constitution') was framed well before the United Nations ('UN') adopted the *Universal Declaration of Human Rights* in 1948. It was framed at a time when the language of human rights did not have the same universal currency that it has today. The discriminatory views expressed by some at the Federation conventions towards non-Europeans, including Indigenous Australians, are well documented.[3] Such views would now be unacceptable to most Australians. But they were not unique to Australia. Attitudes to human rights have changed considerably around the world during the last century. There is no reason to suppose that they will not continue to change.

The Constitution does not adopt the same approach to the protection of individual rights as that adopted by the *Constitution of the United States of America* ('US Constitution'). It does not contain a 'Bill of Rights'. However, it does expressly guarantee some important freedoms: trial by jury (s 80); freedom of religion (s 116); prohibition on discrimination on the basis of State residence (s 117); freedom of inter-State trade and commerce (s 92); and the acquisition of property only on just terms (s 51(xxxi)). The framers also placed great faith in parliamentary democracy and in the ability of the Parliament to give adequate protection to individual rights. The Constitution embodies the key democratic principles of parliamentary democracy and representative government.

In recent times, the High Court of Australia ('High Court') has focused on these democratic principles and inferred from the sections of the Constitution which embody them freedoms that are not expressly guaranteed by the Constitution. In particular, the High Court has found that the Constitution protects freedom of political communication.[4] This freedom was seen to derive from ss 7 and 24 of the Constitution. These sections provide, respectively, that the Senate and the House of Representatives shall be composed of members 'directly chosen by the people'.

The principle of representative government plays a vital role in the protection of rights in Australia. The Australian people can hold political leaders accountable for breaches of whatever rights those leaders undertake to protect and enforce. Grand statements of human rights contained in a constitution may mean little if the government of the day is not accountable for protection of those rights.

---

3 See, eg, Justice Ronald Sackville, 'A Bill of Rights: Form and Substance' (2000) 19 *Australian Bar Review* 101, 102-3; George Williams, *Human Rights Under the Australian Constitution* (1999) 41-2.

4 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Industrial Relations Commission Case*'); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('*Electoral Advertising Bans Case*').

III OTHER RECOGNITION OF RIGHTS AND RESPONSIBILITIES

A Common Law Recognition

The rights of Australians are also protected by the common law. Indeed, in the common law world, this is the traditional method by which the courts have provided justice to individuals engaged in disputes with each other or with governments.

An entire body of administrative law grew up at common law as the result of courts applying basic principles of justice in disputes between individuals and governments. The common law guarantees a right to natural justice in many cases, which includes the right of a person to be heard before a decision is taken which would adversely affect that person.[5] The common law also guarantees a number of rights for individuals involved in criminal trials. For example, in *Dietrich v R*[6] the High Court identified a common law right to a fair trial. In *Mabo v Queensland [No 2]* ('*Mabo*'),[7] Brennan J expressed the view that the common law can be modified to take into account 'contemporary notions of justice and human rights'. He found, as did a majority of the High Court, that the doctrine of *terra nullius* was no longer a part of the common law of Australia. This cleared the way for the historic recognition of native title in Australian law.

The common law of Australia is constantly evolving and has proved an important element in Australia's system of rights protection. The limitations of the common law in protecting rights should, however, be acknowledged. The rights protected by the common law are limited. They evolve slowly over time depending on the disputes that come before the courts and are designed to resolve those *particular* disputes. Moreover, the rights protected by the common law are by no means cast in stone – they are subject to legislation. However, the relationship between judge-made law and legislation allows for a constructive interaction between the legislative and judicial arms of government about rights. Elected Australian legislatures can ultimately determine whether the courts are truly giving expression to contemporary notions of justice and human rights. This is an appropriate role for elected parliaments.

B Legislative Recognition

In addition to the recognition of rights under the common law, there is considerable legislative recognition and protection of human rights in Australia. At the federal level alone, there is a number of Acts which protect human rights.[8] Many are concerned with the central goal of eliminating discrimination and

5 *Ridge v Baldwin* [1964] AC 40; *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222.

6 (1992) 177 CLR 292.

7 (1992) 175 CLR 1, 29-30.

8 There is also a great deal of State and Territory human rights legislation, including anti-discrimination laws.

ensuring equality of opportunity in a range of fields.[9] There is also privacy[10] and freedom of information[11] legislation. Federal privacy legislation will soon be extended to cover the private sector.[12]

The rights contained in these legislative instruments can be taken away or modified by the Commonwealth Parliament. However, the statements of rights in these Acts of Parliament are powerful public statements. Governments that wish in any way to change these rights will be closely scrutinised. The strength of legislative protection of rights should therefore not be underestimated.

C International Law Recognition

Australia has been a leading player in the recognition of human rights at the international level. Australia is a signatory to a number of international instruments, which recognise a wide range of human rights.[13] While these instruments are not themselves part of Australian law, they signify Australia's commitment to the protection of the rights recognised in them. Australian residents have the right to pursue breaches of some of these instruments through domestic bodies such as the Human Rights and Equal Opportunity Commission ('HREOC'), as well as through international bodies.[14] This is an indication of how seriously Australia takes its commitments to international human rights law. While Australia has expressed concerns with some of the international arrangements for implementing and overseeing human rights treaties, there is no doubt about Australia's commitment to its obligations under international human rights instruments. Australia is committed to improving international human rights monitoring by the UN treaty committees.

---

9 See, eg, *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

10 *Privacy Act 1988* (Cth).

11 *Freedom of Information Act 1982* (Cth).

12 *The Privacy Amendment (Private Sector) Act 2000* (Cth) will come into effect on 21 December 2001.

13 For example, Australia is a party to the six major human rights treaties: the *International Covenant on Civil and Political Rights*, opened for 19 December 1966, ATS 1980 No 23 (entered into force 23 March 1976) ('*ICCPR*'), ratified in 1980; the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, ATS 1976 No 5 (entered into force 3 January 1976) ('*ICESCR*'), ratified in 1975; the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, ATS 1975 No 40 (entered into force 4 January 1969) ('*CERD*'), ratified in 1975; the *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, ATS 1983 No 9 (entered into force 3 September 1981), ratified in 1983; the *Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment* ('*CAT*'), opened for signature 10 December 1984, ATS 1989 No 21 (entered into force 26 June 1987), ratified in 1989; and the *Convention on the Rights of the Child*, opened for signature 20 November 1989, ATS 1991 No 4 (entered into force 2 September 1990), ratified in 1990.

14 Australians can lodge communications alleging breaches of the *ICCPR* with the United Nations Human Rights Committee, pursuant to the *[First] Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, ATS 1991 No 39 (entered into force 23 March 1976), which entered into force for Australia on 25 December 1991. There are also communications mechanisms for individuals under the *CAT* (art 22) and *CERD* (art 14).

IV A BILL OF RIGHTS

A Pros and Cons

Despite these various layers of human rights recognition in and by Australia, calls for a Bill of Rights continue. The basic arguments for and against a Bill of Rights in Australia are by now well known. By a Bill of Rights, we generally mean a list of rights recognised within a particular community as deserving of protection under the law. The rights are often quite general in nature and so are expressed in broad terms, such as the right to free speech or the right to privacy.

A Bill of Rights may or may not be constitutionally entrenched. Probably the best known entrenched Bill of Rights is the first ten amendments to the US Constitution. An example of a non-entrenched Bill of Rights is the New Zealand *Bill of Rights Act 1990* (NZ). Unlike the United States ('US') and Australia, New Zealand does not have a written constitution. The *Bill of Rights Act 1990* (NZ) has the status of an Act of the New Zealand Parliament. Somewhere in between is the *Canadian Charter of Rights and Freedoms 1982* ('Canadian Charter'). The Canadian Charter has constitutional status in Canada, but a number of its provisions can be overridden by an Act of the Canadian Parliament or a provincial legislature, if done so expressly.[15]

There is a number of arguments commonly raised in support of a Bill of Rights. Proponents argue that rights are currently not given sufficient protection under Australian law. They point out that Australia is one of the few remaining democracies that does not have a Bill of Rights. It is said that a Bill of Rights would improve protection for minorities by tempering majoritarianism. It is also argued that a Bill of Rights would play an important role in educating people about their rights and the rights of others.

Those who question the need for a Bill of Rights in Australia raise a number of opposing arguments. They counter that rights are in fact well protected in Australian law; by statute, the common law and under the Constitution. They argue that rights are best protected in a healthy democracy by Parliament and not by unelected judges. A Bill of Rights may create a culture in which rights are protected mainly through expensive and protracted litigation. There would also be a danger that it would be difficult to amend a Bill of Rights (particularly a constitutionally entrenched one) to reflect changing community views on what rights should be protected and the appropriate balance to be struck between competing rights.

B Previous Proposals for Change

Past attempts to introduce broad statements about rights into Australian law have failed to achieve any consensus and have therefore not succeeded. The most recent attempt to amend the Constitution in 1988, essentially to extend some of the rights which it already contains, was defeated decisively. A 1944

15 Section 33(3) of the *Canadian Charter of Rights and Freedoms 1982* provides that a declaration that an Act or a provision in an Act operates notwithstanding a relevant provision of the Charter ceases to have effect five years after it comes into force. Such a declaration may be re-enacted.

amendment proposal, which included the insertion of guarantees of speech and expression, was also defeated. It is almost unnecessary to observe that proposals for constitutional change in Australia do not often succeed. The proportion of successful referendum attempts is notoriously small. Even if a constitutionally entrenched Bill of Rights could be accepted as a good idea in principle, bringing about such change would not be straightforward.

There have also been several attempts to introduce statutory Bills of Rights at the federal level. The Human Rights Bill 1973 (Cth) sought to implement the *International Covenant on Civil and Political Rights* ('*ICCPR*') in Australia. It encountered considerable opposition and was never enacted. An attempt to introduce the watered down Australian Human Rights Bill 1985 (Cth) also failed.

C Out of Step?

As noted above, one of the arguments frequently relied upon by advocates of a Bill of Rights is that Australia is out of step with the international community.

It is true that countries with similar political and legal systems to our own, such as Canada, New Zealand and the US, now have a Bill of Rights in one form or another. The newest member of the Bill of Rights 'club' is the United Kingdom ('UK') – the *Human Rights Act 1998* (UK) came into force on 2 October 2000.

Of course, Australia should not seek to ignore international opinions or trends or to isolate itself from the world community. But we must not simply follow trends. Given that a Bill of Rights is often seen as a vehicle for protecting minorities, there would be more than a hint of irony in Australia rushing to enact a Bill of Rights in order simply to cast aside any perceived 'minority' status. The key question in relation to an Australian Bill of Rights is whether it would actually improve the current situation.

A Bill of Rights may be seen as one way of protecting minority rights from majority rule through broad statements of principle. However, the various approaches adopted by other nations must be considered very carefully in the light of Australia's existing legal, governmental and democratic processes. For example, it might well be argued that the need for a Bill of Rights is not so great in Australia as it is in Canada, the UK or New Zealand, given the existing rules regarding the composition and role of the Australian Parliament and, in particular, the Senate and its committee system.

The Canadian Senate is appointed by the Canadian Governor-General on the recommendation of the Prime Minister. It is not elected. The composition of the Canadian Senate is controlled by the government of the day. The Australian Senate is much more likely to be attuned to the need to protect minority interests. By virtue of proportional representation, it is rare for the Senate to be controlled by the government of the day. Smaller parties representing various interests often wield considerable power in the Senate and often have a significant impact on the legislative process. Smaller parties or individuals may thus exert considerable influence.

The House of Lords in the UK, like the Canadian Senate, is an unelected house of review. It is not directly representative and may not represent diverse interests in the way that the Australian Senate does. New Zealand has had no upper house of parliament since 1950.[16]

Federalism can also be an important check on majoritarianism. Australia's federal Constitution establishes a division of governmental power between the Commonwealth and State governments. A federal system clearly limits the power of the central government and potentially allows for greater representation of smaller and more diverse interests.

Additionally, less populous States may exercise influence through the Australian Senate. Canada is a federal state, and provincial interests are represented in the Canadian Senate, but only indirectly as the Senate is not elected. The House of Lords does not represent regional interests in the UK. Recent reforms to the House of Lords in fact mean that the remaining hereditary peers are now 'elected' by the political parties in proportion to their representation in the House of Commons.

Unlike some other countries that have a Bill of Rights, Australia has a written Constitution. For that reason, there are greater limits on parliamentary sovereignty in Australia than in the UK and New Zealand (which do not have written constitutions). In countries without written constitutions, there are surprisingly few checks on the supremacy of parliament.

Apart from express restrictions on governmental powers and the division of powers between the Commonwealth and the States, the Constitution also embodies the separation of powers doctrine. This doctrine is an important means of protecting rights. It prevents the concentration of governmental power. It protects the independence of the judiciary, which is vital for the protection of individual rights against abuses of power by government. Countries like New Zealand and the UK, which do not have written constitutions that embody the separation of powers doctrine, clearly have independent judiciaries. However, our written Constitution gives the separation of powers doctrine a particular vitality in Australia.[17]

It was decided, as early as 1915,[18] that the strict separation of judicial power was a constitutional imperative in Australia. Only Chapter III courts can exercise the judicial power of the Commonwealth.[19] The High Court has not been reluctant to find government legislation invalid for violating the separation of powers doctrine.[20] By contrast, Quick and Garran noted in 1901 that in Great Britain, 'owing to the supremacy of the legislative power', the distinction between the three arms of government had not been the subject of decisions in

16 See Michael Principe, 'The Demise of Parliamentary Supremacy? Canadian and American Influences upon the New Zealand Judiciary's Interpretations of the Bill of Rights Act of 1990' (1993) 16 *Loyola of Los Angeles International and Comparative Law Journal* 167, 193-4.

17 See, eg, *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 ('*Brandy*').

18 *New South Wales v Commonwealth* (1915) 20 CLR 54 ('*Wheat Case*').

19 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers' Case*').

20 See, eg, *Brandy* (1995) 183 CLR 245.

the courts, although it had been recognised by commentators.[21] Probably due to the dominance of the principle of parliamentary supremacy in the UK, lawyers and politicians there have also traditionally been far less comfortable with the idea of unelected judges striking down legislation on any ground.[22]

Comparisons such as these show that, so far as a Bill of Rights is concerned, it is certainly not the case that 'one size fits all'.

D Future Recognition of Rights in Australia

What then does Australia have to gain from a Bill of Rights? Of those countries which have recently adopted a Bill of Rights, Canada, New Zealand and the UK have all opted for either a non-entrenched or a partially entrenched Bill of Rights. There has been a reluctance to entrench a Bill of Rights as was done by the US over two centuries ago.

The US experience shows how a constitutional Bill of Rights may entrench the values of a particular generation. One wonders whether a majority of Americans would now choose to entrench a right 'to keep and bear arms' if it were not already guaranteed by the US Constitution. This is a notorious example of an historical 'right' which sits uneasily in the modern world.

As noted above, the framers of our Constitution placed considerable faith in democratic institutions as a bulwark against bad governance. They chose not to include an American-style Bill of Rights in the Constitution. The principles of parliamentary sovereignty and representative democracy are important features of our political and governmental landscape. These are durable principles which have served us well. It is not clear that a constitutional Bill of Rights would serve us so well.

We may be able to agree on certain rights that are deserving of recognition at a particular time or for a particular period. It may even be possible to agree that certain rights are timeless. However, there can be no getting away from a constant balancing of interests. Rights do not exist in isolation. Rights and responsibilities are different sides of the same coin.[23] Granting a right to one person or group may effectively impose obligations on others or may restrict or interfere with the competing rights or interests of others. One person's right to free speech may infringe another's right to a free and fair trial or to privacy. The granting of rights therefore requires the striking of a balance. Getting the right balance is often not easy, and may depend on evolving standards of justice and fairness.

If we list a number of broad rights in our Constitution (eg, a right to free expression, a right to privacy, a right to equality before the law, a right to life), it may be left to the courts to strike an appropriate balance between competing

---

21 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 720.

22 See O Hood Phillips, 'A Constitutional Myth: Separation of Powers' (1977) 93 *Law Quarterly Review* 11.

23 See, eg, Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Legal Reasoning' (1913) 23 *Yale Law Journal* 16; discussed in J G Wilson, 'Hohfeld: A Reappraisal' (1980) 11(2) *University of Queensland Law Journal* 190.

rights in individual cases. It may also fall to the courts to strike a balance between the rights listed in the Bill of Rights and competing interests and rights which, for whatever reason, are not included in the Bill of Rights. The Canadian Charter makes express provision in relation to this latter issue. Section 1 of the Charter provides:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be justified in a free and democratic society.

It is difficult to argue with the reasonableness of the formula in s 1. But it undoubtedly leaves for another day the difficult question of the extent of the 'guarantee' offered by the Charter.

The more general the statement of rights, the more difficult it becomes to predict how it will apply. There is good reason for leaving the job of developing guidelines on such issues to the elected representatives of the Australian people. In his 1996 Mitchell Oration, Fr Frank Brennan went to the heart of this issue:

> There can be no getting away from a balancing of interests. Who best to do the weighing, the legislators elected by all or the judges nominated by the few? ... Without a constitutional Bill of Rights unelected judges and elected politicians can each play a role in getting the balance right ... Were the Australian Constitution to contain equal protection and due process clauses, there would be a whole set of controversial policy issues reserved as the exclusive province of the judges.[24]

It is healthy for a democracy to foster a practical 'dialogue' between parliaments and the judiciary (such as the common law allows) about the protection of human rights. An entrenched Bill of Rights may cut the Australian people and their elected representatives out of that dialogue. On the other hand, a narrow interpretation of a Bill of Rights could significantly undermine the protection which many groups may hope to achieve by entrenching certain rights.

A statutory Bill of Rights might provide scope for refinement of statutory statements by the Parliament over time. However, there is the risk that it will introduce a new rigidity into the protection of rights. Attempts to change a statutory Bill of Rights, or to change its effect by enacting new legislation, may run into opposition if the statute is perceived as an immutable statement of principles.

Further, if Parliament can change a Bill of Rights or modify its impact by an ordinary Act of Parliament, one must ask if there is any great advantage over our current situation, in which Parliament can enact specific legislation to protect rights as the need becomes apparent. The current approach probably also allows the Parliament to give more detailed and careful consideration to a particular right and how it should be protected in different circumstances. The temptation with a Bill of Rights is to enact a statement of right-sounding principles. The real difficulty is in knowing how those principles will be applied or operate in the future.

---

24 Frank Brennan, 'Thirty Years On, Do We Need a Bill of Rights?' (1996) 18 *Adelaide Law Review* 123, 149-50.

As noted above, Australian governments have already shown they are prepared to enact legislation to protect human rights. The Australian statute book already contains many such laws. Future governments may see the need to enact further legislation. Australian governments are well aware of their international obligations to protect human rights. They do not take those obligations lightly. Australia will continue to be influenced by world opinion on the most appropriate way to protect rights. However, up until now, governments have generally regarded Parliament as the most appropriate machinery for making decisions about protecting rights and balancing competing rights. This approach has served us well. It has given us an enviable reputation for human rights protection.

Parliaments must be responsive to the views of the community on human rights. They must also be sensitive to the reasonable concerns of minority interests. Both sides of the Bill of Rights debate should agree on one point – that a healthy democracy is not just about majority rule. Australian Parliaments have demonstrated that they are capable of protecting minority interests. The courts are also very important players in protecting individual rights against the state and against other powerful interests. The executive government is sometimes portrayed as an oppressor of individual rights. However, the executive arm of government can and does play an important role in recognising and protecting individual rights. Administrative bodies have the advantage of potentially offering speedier, less expensive and less complicated access to remedies for the enforcement of individual rights. They can also specialise in human rights protection, or in a particular area such as race discrimination. Under a Bill of Rights, it is likely that individuals would need to litigate their rights in the courts at greater expense and with more significant delays.

HREOC, in strict legal terms part of the executive but in fact a body independent of the government, has achieved some success as an advocate for human rights protection. The executive, and additionally bodies like HREOC, can also undertake the important educative function of raising awareness about rights and avenues for rights protection in the community. The Howard Government's commitment to practical measures such as education about human rights is demonstrated by proposed reforms to HREOC.[25] These reforms will increase the Commission's capacity to promote and protect the human rights of all Australians and to deal with a broad range of human rights issues.

V CONCLUSION

The Bill of Rights debate in Australia has a long history. However, the debate is still a worthwhile one because it allows us to reflect on the adequacy of the recognition and protection of human rights.

The proponents of a Bill of Rights have the onus of convincing their opponents that there is, on balance, a benefit in having an Australian Bill of

25 See the Human Rights Legislation Amendment Bill (No 2) 1999 (Cth).

Rights. Australia should not join the Bill of Rights 'club' unless it is clear that membership represents an improvement on the very powerful system of rights protection that we already have.

All three arms of government – the legislature, the executive and the judiciary – have important roles to play in protecting human rights in Australia. They have undertaken the task with considerable success. There is no reason why this partnership should not continue to be an effective means of protecting rights.

Australia has a proud record of protecting and recognising rights. We should be confident that this record will continue without Australia adopting a Bill of Rights. If we can foster a culture of tolerance and respect for the inherent dignity of all human beings, such a culture will go a long way towards guaranteeing lasting protection for human rights.