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## The Rights Trap: How a Bill of Rights Could Undermine Freedom

by Bob Carr

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***The culture of litigation and the abdication of responsibility that a bill of rights engenders is something that Australia should try and avoid at all costs.***

There have been many calls recently to introduce an Australian bill of rights. Debates have arisen over what types of rights to include in a bill of rights and how a bill of rights should apply. My objections to the legislative enactment or constitutional entrenchment of a bill of rights, however, are more fundamental. Parliaments are elected to make laws. They should not abdicate their policymaking functions to the courts.

### The transfer of policy decisions from governments and Parliament to the judiciary

A bill of rights transfers decisions on major policy issues from the legislature to the judiciary. It is not possible to draft a bill of rights which gives clear cut answers to every case. No right is absolute. Rights conflict.<sup>1</sup> The right of freedom of speech will conflict with the right to equality (e.g. racial vilification) and the right to equality will in turn conflict with the right to freely exercise one's religion (e.g. the right to exclude females from the priesthood). While these are extreme forms of conflict, most conflicts will be more subtle and difficult to determine.

A bill of rights can only be interpreted by the Courts by balancing rights and interests. Most modern bills of rights include a clause recognising that rights may be subject to such reasonable limits 'as can be demonstrably justified in a free and democratic society'.<sup>2</sup> This is clearly a policy decision, not a judicial issue. If a bill of rights were enacted, it would then be up to a court to decide whether

freedom of speech should be limited in relation to pornography, tobacco advertising, solicitation for prostitution and the publication of instructions on how to make bombs. These are issues that need to be considered in the context of community views. They are issues which should be decided by an elected Parliament whose Members are ultimately responsible to the people for the decisions they make. They are not decisions that should be made by judges, who are not directly accountable to the people.

There are additional problems in legislatures abdicating their policy role to the courts on human rights issues. Courts operate within an adversarial process. Matters only arise before them when there is a dispute and judgments are made on the basis of particular facts. Decisions are therefore piecemeal in nature and cannot take into account all issues relevant to determining policy. The material before the courts is limited by rules of evidence and procedure and the courts do not have presented before them all the matters which should be taken into account when developing a broad policy on rights issues. In short, a court is not an appropriate forum for making these decisions.

Further, a bill of rights will unduly politicise the judiciary. Judges will be seen more and more as policymakers, undermining the role and independence of the judiciary.

### **How are rights really protected?**

Some of the most abusive and oppressive regimes have had extensive bills of rights. In reality, it is not a 'bill of rights' which protects rights. Nor can the courts alone adequately protect rights. The protection of rights lies in the good sense, tolerance and fairness of the community. If we have this, then rights will be respected by individuals and governments, because this is expected behaviour and breaches will be considered unacceptable. A bill of rights will only have the effect of turning community values into legal battlefields, eventually undermining the strength of those values.

The respected American jurist, Judge Learned Hand once said:

[T]his much I think I do know— that a society so riven that the spirit of moderation is gone, no Court can save; that a society where that spirit flourishes no Court need save; that in a society which evades its responsibility by thrusting upon the Courts the nurture of that spirit, that spirit in the end will perish.<sup>3</sup>

### ***'Freezing' rights***

Our view of the importance and priority of rights changes over time. A constitutionally entrenched bill of rights freezes those priorities at a particular point in time. If a bill of rights had been included in the Commonwealth Constitution in 1901 it would most likely have enshrined the 'White Australia policy'. The 'right to bear arms' is a 'right' under the United States Constitution that many see

as the root of the tragic shootings which afflict that country. It is not enough to say that these rights can be changed by a constitutional referendum. We all know that referenda are rarely held and are rarely successful.

Even when a bill of rights is not constitutionally entrenched, and can therefore be changed by legislation, the political reality is that a bill of rights is given 'quasi-constitutional status' and is almost impossible to amend.

#### *Unpredictable interpretation*

Another problem with a bill of rights is the unpredictable ways in which it will be applied by the Courts. Sir Harry Gibbs, former Chief Justice of the High Court, has noted that the 'due process' clauses of the United States Constitution (which prohibit anyone from being deprived of life, liberty or property without due process of law) have been used to render invalid laws limiting working hours, fixing minimum wages and standardising the quality of food'.[4](#)

In New Zealand, despite political assurances to the contrary when the Bill of Rights was enacted, [5](#) the courts have created new remedies to apply to breaches of the Bill of Rights. For example, the New Zealand Court of Appeal has held that the 'right to freedom of speech' includes a power for the Court to order the publication of a correction of defamatory material. [6](#) The Court has also held that the State is liable to pay monetary compensation for breaches of the Bill of Rights. [7](#) Even the Parliament found, to its surprise, that it was subject to the Bill of Rights and had to apply natural justice, particularly in parliamentary committee hearings. [8](#) While the New Zealand Parliament has the power to amend the Bill of Rights, as noted above the political reality is that this is usually not an option.

#### **The creation of a culture of litigation**

A Bill of Rights will further engender a litigation culture. Already it seems that people are unable to accept responsibility for their own actions. If a person trips and falls today, instead of blaming himself or herself for carelessness, the person will be looking for someone to sue. If a person is burnt by coffee while juggling it and driving a car at the same time, instead of recognising that this is a really stupid thing to do, the person will sue because the coffee was too hot. How much more litigation will we be inviting by a bill of rights?

A quick look at the law reports of Canada and New Zealand will show the extensive use of their respective bills of rights in litigation. [9](#) It will also show that the primary use of a bill of rights is in relation to criminal appeals. In New Zealand, in the first seven years after the Bill of Rights Act was enacted, it was invoked by the accused in literally thousands of criminal law cases, a large number of which were appealed to the Court of Appeal [10](#) (the highest court in New Zealand). Some may argue that this shows the system for prosecuting defendants was deficient, and indeed reforms were made. However, the fact is that the Bill of Rights continues to be routinely used

as a ground for attempting to overturn the admissibility of evidence, including confessions, evidence obtained under search warrants and breath testing of drunk drivers. It gives lawyers a new source of technicalities to allow the guilty (including those who have confessed or were found with large quantities of drugs in their possession) to go free.

Bills of rights are notorious for being the last ground of the desperate in litigation. The broad terms of 'rights' can be argued to cover almost anything. For example, the New Zealand courts have considered the case of a man who claimed that the Bill of Rights protected his right to walk down his suburban street naked (on grounds of freedom of expression, religion and belief ) [11](#) and a case where it was claimed that a rise in rent for public housing breached the 'right to life' in s. 8 of the Bill of Rights.[12](#)

In a recent Australian case, a prisoner brought a legal action on the basis that his human rights were being abused because there was not enough variety in the vegetarian meals offered at a prison. [13](#) He relied on the International Covenant on Civil and Political Rights, which is often described as the International Bill of Rights. However, his claim was rejected because (unlike a bill of rights) the treaty is not enforceable at Australian law.

While those who propose the enactment of a bill of rights do so with the intent that it be used for lofty purposes, the more likely result is expensive litigation concerning naked strollers, vegetarian menus, and new ways to avoid losing your licence for drink driving.

While the Courts are swamped with thousands of Bill of Rights cases, where will the ordinary person go for justice? The Courts will be made even more inaccessible and the cost of running the court system will increase. The main beneficiaries of a bill of rights are the lawyers who profit from the legal fees that it generates and the criminals who manage to escape imprisonment on the grounds of a technicality. The main losers are the taxpayers, and society in general through the reduction of community values to mere courtroom weapons.

## Conclusion

Parliaments are elected to make laws. In doing so, they make judgments about how the rights and interests of the public should be balanced. Views will differ in any given case about whether the judgment is correct. However, if the decision is unacceptable, the community can make its views known at regular elections. This is our political tradition.

A bill of rights would pose a fundamental shift in that tradition, with the Parliament abdicating its important policy making functions to the judiciary. I do not accept that we should make such a fundamental change just because other countries have bills of rights. The culture of litigation and the abdication of responsibility that it engenders is something that Australia should try and avoid at all costs. A bill of rights is an admission of the failure of parliaments, governments and the people to

behave in a reasonable, responsible and respectful manner. I do not believe that we have failed.

### Endnotes

**1** For an analysis of such problems see D. O'Callaghan, 'The United States Experience of Unfettered Speech and Unfair Trials: A Case Against an Australian Bill of Rights', ALJ 72 (1998), 957.

**2** New Zealand Bill of Rights Act 1990, s. 5; Canadian Charter of Rights and Freedoms; cl. 1.

**3** Learned Hand, *The Spirit of Liberty*; Papers and Addresses, 2nd edn. (1954), 164.

**4** H. Gibbs, 'A Bill of Rights' Australian International Law Journal 3 (1994-5), at 5.

**5** The Minister, Geoffrey Palmer, informed the NZ Parliament that the Bill of Rights 'creates no new legal remedies for courts to grant'. See Parliamentary Debates 510 (NZ: 1980), 3449- 3450. See also discussion in M. Taggart, 'Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990', Public Law 266 (1998), at 269.

**6** TV3 Network Ltd v Eveready New Zealand Ltd [1993] 3 NZLR 435 7 Simpson v Attorney-General (known as Baigent's Case) [1994] 3 NZLR 667. For further discussion see P. A. Joseph, 'The New Zealand Bill of Rights', PLR

**7** (1996), 162.

**8** P. A. Joseph, as above, at 172-3.

**9** Frank Brennan has noted that by 1990 there had been over 4000 cases concerning the Canadian Charter of Rights and Freedoms, over 100 of which were decided by the Supreme Court. Delays in handing down judgments by the Supreme Court also increased significantly: F. Brennan, *Legislating Liberty—A Bill of Rights for Australia?* (1998), 28.

**10** M. Taggart, 'Tugging on Superman's Cape', at 274. He also notes that over 250 pages of the leading criminal law loose-leaf text deal with the Bill of Rights.

**11** R v Ceramalus, unreported, 17 July 1996, per Thomas J. While his claim was not successful, the US Supreme Court has held that nude dancing in bars is protected by the First Amendment because it is a form of erotic expression although a law requiring that dancers wear G-string is acceptable as it is not directed at limiting the erotic expression: *Barnes v Glen Theatre Inc.* 501 US 560 (1991). See also: *Erie v Pap's A.M.* (US Sup Crt, 29 March 2000).

**12** *Lawson v Housing NZ* [1997] 2 NZLR 474. *13 Minogue v Williams* [2000] FCA 125 (17 February 2000).

**The Hon. Bob Carr MP** is Premier of New South Wales (1995 to present). This article is based on his submission to the Standing Committee on Law and Justice Inquiry into a NSW Bill of Rights.

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