Bill of rights is the wrong call

- Bob Carr

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IF Australians were asked whether they wanted non-elected judges to enjoy the final say on all public policy, it is pretty clear how they would vote. A modest increase in judicial review was proposed in 1988. Voters were asked only to endorse trial by jury, freedom of religion and fair terms for property acquired by government, by inserting these as rights in the constitution. The referendum lost in every state and territory by votes of up to 75 per cent.

Now the federal Government has an inquiry into how rights can best be protected in Australia. The advocates of a bill of rights have watered down their proposal to a charter based on legislation and not added to the constitution, and which parliaments can in theory overrule.

This faces a bigger hurdle than mere public disdain: there is now close to a consensus that it would be unconstitutional.

"How can anyone be opposed?" ask the frustrated enthusiasts who've tried to agitate for this issue. Well, to start with, a charter or a bill of rights guarantees nothing.

Britain abolished slavery in 1772 with a court decision based on the common law. The US, as late as 1857, confirmed slavery was valid, notwithstanding its constitutional Bill of Rights.

Indeed, America had a Bill of Rights for 150 years before black Americans in the south could vote. And they didn't get it through the Supreme Court; they got it because black Americans mobilised politically.

Joseph Stalin's 1936 constitution was eloquent on rights but he murdered 20 million Soviet citizens.

I've probably made the point but bear in mind some of the least democratic countries have enumerated freedoms in their constitutions: Zimbabwe and Sudan, for instance.

Because this will be determined within the ALP, Labor supporters need to think how a charter will be used by future conservative governments.

Conservatives would add to it a right to property, I think inevitably. Given a conservative court, this would be enough to prevent a Labor government stopping the clearing of native vegetation on farms, stopping the clearing of pockets of rainforest on private land or banning a developer from carving canal estates into property.

The right to property, written into a charter of rights, could go anywhere because a charter is filled with decorous generalities or abstractions, but judges determine what the words mean.

Another possibility should concern Labor. It's a reasonable assumption a conservative government would add freedom of association to a charter. This would invite conservative judges to outlaw trade union recruitment in a workplace.

That would mean parliament being required to overrule the court. That may mean persuading a Senate with a non-Labor majority to take on the judges.

I am surprised at the naivete and gullibility that leads some people to think a charter of rights means that, for the ages, courts will facilitate a left-liberal or reform agenda. They imagine it's only the rights they want that will be enshrined in judge-made law.

Who disagrees with freedom of speech? In 1994 in Canada, the Supreme Court interpreted that right - expressed in the charter adopted in 1982 - to mean tobacco advertising could be resumed, even near schools.

The right to freedom of movement: again, who could disagree? In 1999 judges relied on this right to strike down British Columbia's policy requiring incoming doctors from other provinces to work in rural and remote areas.

Advocates respond by saying that with a charter of rights - not a bill of rights - parliament will still have the final say, as under the Victorian charter. So when a court issues an opinion the government has breached rights, parliament has the opportunity to fix things up with another act of parliament.

But we now know that at the federal level this model is unconstitutional. Two former high court judges, Michael McHugh and Gerard Brennan, have said as much.

They believe requiring the High Court to play an advisory role to parliament, rather than make decisions binding on parties to a lawsuit, is outside the court's power.

In any case, governments are reluctant to overrule judges.

This then opens up a process of judicial creep in which judges get their way more and more, especially in the Australian system, where it would be hard to get a Senate - generally controlled by minority parties - to overrule judges when they have invoked the charter.

Geoffrey Robertson argues that we are less free than nations with bills of rights. This would be curious to Thomas Ivey who, as we go to press, is scheduled to be escorted from death row in South Carolina and judicially executed.

More than 3000 Americans on death row in 34 states await this fate. This year, 36 prisoners are expected to be executed.

Say a prayer for sad, deprived Australia without a bill of rights. Capital punishment was abolished by elected politicians years ago.

Advocates talk as if we have a consensus on what goes in a charter. Robertson's draft bill includes the rights of children. Fine, but how, in schools, for example, does it get applied in practice? Before long the exercise of classroom discipline by teachers or principals will run the risk of litigation. This will then force changes to school practice in anticipation of which way a court may jump.

Consider Britain, where the whole bureaucracy - including the police - is now making decisions shaped by a fear of being overruled by court actions on human rights grounds.

Thus when a factory owner had a fence torn down by Gypsies who camped on his land, the police told him they wouldn't shift them because the action would be overruled in court: freedom of movement.

Jack Straw, the British Labour Party's Justice Secretary, has promised to redraft the charter, the Conservatives to replace it.

Robertson's document would include a right to a pristine environment. He's lived in Hampstead too long. Twenty-five years of working with conservationists has demonstrated to me that not even on remotest Cape York does a pristine environment exist on this continent.

Only a clairvoyant would know what judges would make of this power, but that they would make something of it - to veto a wind farm, quite possibly - is entirely likely.

Susan Ryan argues that we need a charter of rights to protect the interests of the disadvantaged, the poor, the marginalised. Strange that in America the disadvantaged still have no health care or guaranteed unemployment benefits and that one in three African Americans will experience prison. The US, with its constitutional Bill of Rights, has the biggest prison population in the world.

When Mohamed Haneef was mistreated by the Australian Federal Police, he had his rights reinstated by the court. That's our common law tradition.

When the Howard government was seen to be treating too harshly the refugees who come to our shores, it was - for these and other reasons - voted out of office. All in the context of robust freedom of speech, which sees executive power challenged and contested every day of the week, every minute of the day. On this ethos our freedoms rest.

To those who say that the treatment of refugees is, on its own, a reason for a charter of rights, my reply is simple.

The Australian people will always want their elected representatives and not unelected judges to make decisions about border policy and migrant intake. Any attempt to shift this to the courts will result in a wave of contumely washing over the judiciary. That is in nobody's interests.

But Australia is the only country in the world without a charter, goes the complaint.

While in theory some European jurisdictions have given domestic force to the European convention, it can have little effect on administration. The freest countries in Europe are often those with the least judicial review.

Norway, for example, tops the ranking in the 2009 Freedom in the World report issued by Freedom House. The Netherlands, too.

Of course, Australia - without a charter - is also in the top bracket. Are we going to give up compulsory voting simply because few other countries have it? It works for us. That is the only test. It is part of our political culture.

Advocates talk about rights as if they were an abstract truth to be uncovered to public acclaim by High Court judges exercising a role like Roman priests in the Temple of Jupiter.

But rights are an area of constant contest. A right to privacy can conflict with freedom of speech. Freedom of movement with a right to property (the Gypsies v the factory owner). Freedom of expression (a right to smoke) with a right to a pristine environment (the right to avoid others' smoke). There's always a balance to be achieved in the light of contemporary concerns and arguments.

But should the balance be designed by the judges or the people we elect?

When Robertson was asked to give examples of rights violations in Australia, he quoted two cases: the shaving of a sailor's beard by hospital staff and the separation of an elderly couple into male and female

areas of a nursing home. Both are easily and better dealt with by a health complaints commission, not resolved in constitutional court.

I say these examples, your honours, hardly prove a brutal indifference to human rights in this country.

The common sense of the Australian people tells them they are free. And that a charter would increase litigation, not rights.

On that I rest my case.

Bob Carr was premier of NSW, 1995-2005.