

Eight reasons why Australia should not have a federal charter of rights

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In the lead-up to the 2007 federal election, the Australian Labor Party committed itself, if elected, to “initiate a public inquiry about how best to recognise and protect the human rights and freedoms enjoyed by all Australians”.¹ Thus, on 10 December 2008, to commemorate the 60th anniversary of the United Nations’ Declaration of Human Rights, federal Attorney-General Robert McClelland announced the intention to consult the public on the introduction of a charter of rights in Australia.

He argued that a federal bill of rights could promote religious tolerance, equal opportunities for women in the workforce, and a higher standard of living for indigenous Australians. Hence, the Rudd Government has already announced a “National Consultation on Human Rights”, appointing Jesuit priest Frank Brennan to lead the consultation.

I should immediately explain that I am totally in favour of any constitutional guarantees which protect our most fundamental rights — our rights to life, liberty and property in particular. However, I simply do not believe any federal charter of rights can achieve these worthy goals satisfactorily. What follows is a non-exhaustive exposition of eight basic reasons as to why Australia should not have a federal charter of rights.

1) Human rights legislation is unnecessary

The tendency of governments to acquire ever-increasing power has traditionally been curtailed in the Western world by a system of checks and balances. According to Sir Harry Gibbs, formerly Chief Justice of the High Court of Australia:²

1. Australian Labor Party, *National Platform and Constitution 2007* (Canberra, ACT), chapter 13, para. 7 (p.207), at: http://www.alp.org.au/download/now/2007_national_platform.pdf
2. Sir Harry Gibbs, “A constitutional bill of rights”, in K. Baker (ed.), *An Australian Bill of Rights: Pro and Contra* (Melbourne, Institute of Public Affairs, 1986), p. 325.

The most effective way to curb political power is to divide it. A federal constitution, which brings about a division of power in actual practice, is a more secure protection for basic political freedoms than a bill of rights.

The effectiveness of human rights legislation is dependent on the socio-political context in which it operates. The impressive bills of rights passed in China, Cuba, Uganda, Rwanda, Cambodia, Russia and the Sudan proved no barrier to multiple human rights abuses committed in those countries. Gibbs writes:³

Anyone who has seen the film *The Killing Fields* will know that the fact that Khmer Republic had adopted a bill of rights did not assist the inhabitants of that unhappy country. We are all familiar with the abuses that have occurred in Uganda: that country had a bill of rights on the European model, and had judges that bravely tried to enforce it, but were unable to resist the forces of lawlessness.

Governments which eschew the rule of law with its inbuilt checks and balances are prepared to use naked power to override bills of rights. They may use legislative power (*per leges*) to achieve their aims, but will not allow themselves to be subject to constitutional checks (*sub leges*). Therefore, bills of rights can only be enforced in countries where there is already a functional constitutional

framework coupled with a culture that places a high value on justice. In such countries, rights legislation is unnecessary.

In a landmark judicial decision, the then Chief Justice of the High Court Sir Anthony Mason commented that “the prevailing sentiment of the framers [of Australia’s federal Constitution] was that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.”⁴ Under the system of government created by the nation’s founding fathers, one proceeds on the assumption of full individual rights and liberty, and then turns to the law just to see whether there are any exceptions to the rule. After comparing this constitutional model with the American one, the late Australian constitutional lawyer, W. Anstey Wynes, commented:⁵

The performance of the Supreme Court of the United States has become embroiled in discussions of what are really and in truth political questions, from the necessity of assigning some meaning to the various “Bill of Rights” provisions. The Australian Constitution... differs from its American counterpart in a more fundamental respect in that, as the... Chief Justice of Australia [Sir Owen Dixon] has pointed out, Australia is a “common law” country in which the

3. Gibbs, *op. cit.*, p. 40.

4. *Australian Capital Television Pty Ltd v. The Commonwealth* (1992), 177 CLR 106, p.136.

5. W. Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (Sydney: The Law Book Co., 1955) p. vii.

State is conceived as deriving from the law and not the law from the State.

2) A federal charter of rights may reduce individual rights

In 1776, the 13 American colonies in their Declaration of Independence broke their ties with England, stating that they were assuming “among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them. We hold these truths to be self-evident, that all men are created equal, and that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness. ... That wherever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government.” For them the whole purpose of human rights was to protect the citizen against excessive government power. They regarded as “inalienable” only the rights of the individual which are associated with the protection of human life, public security, private property, and freedom of speech.

A second generation of rights appeared in the 19th century, requiring the government to provide services such as shelter, clothing, food, health care and education for their citizens. Recently a

further generation of rights, including the right to a healthy environment, self-determination, the preservation of particular cultural traditions and the unhindered practice of alternative lifestyles, emerged. Many of these “new” rights are called “group” rights, because they are targeted to specific racial, religious or ideological communities. Rights of this type are used by social activists seeking radical change, and are currently embedded in the legal systems of Canada, the United Kingdom and New Zealand. Gerry Ferguson writes of their effect in Canada:⁶

Like an exploding bomb dropped in the middle of the Canadian legal system, it has destroyed a few laws, shaken up a host of other laws and generated an immense amount of activity and at least some anxiety.

There are numerous and very serious problems with group rights, as rights are not a single indivisible entity. They can and do conflict. Too much emphasis on group rights results in the automatic reduction of individual rights. Group rights, by granting special privileges to certain ethnic, religious and gender groups, can lead to the marginalisation and even persecution of less-favoured groups. The situation is disturbingly similar to that which occurred under totalitarian regimes like Nazi Germany where the group was everything and the individual nothing. Sociology Professor Alvin J. Schmidt writes:⁷

6. Gerry Ferguson, “The impact of an entrenched bill of rights: the Canadian experience”, *Monash University Law Review*, Vol. 16, No. 2, 1990, p. 213.

7. Alvin J. Schmidt, *How Christianity Changed the World* (Grand Rapids, Michigan: Zondervan, 2004), p. 259.

Political, economic and religious freedom can only exist where there is liberty and freedom of the individual. Group rights that determine a person's rights on the basis of belonging to a given ethnic or racial group, as presently advocated by multiculturalists and by affirmative action laws, nullify the rights of the individual. Group rights greatly reduce the freedom of the individual in that these rights stem only from the group; if he does not belong to the group, his rights are greatly curtailed. ... When group rights get the upper hand, gone are the "inalienable rights" given to the individual by his Creator so admirably expressed by the American Declaration of Independence.

But even if a charter of rights is entirely free from group rights, it still might be used to reduce basic rights and freedoms. The US Bill of Rights, which was enacted "in an age pre-dating both the scourge of political correctness and the Left's capture of the legal profession",⁸ is free of any such activist jargon. Nonetheless, the US Supreme Court's interpretation of, among other things, freedom of religion as prohibiting students from voluntary praying in public in government schools,⁹ and of the right to due processes as incorporating an effective right to abortion, demonstrate that even a more "conservative" bill

of rights is susceptible of gross abuse and manipulation.

3) A federal charter of rights may give excessive power to the judiciary

Charters of rights lead to the politicisation of the judiciary. As the generalities expressed in rights documents must be applied to particular real-life situations, and as rights frequently conflict with each other, there is need for judicial interpretation. After all, says Professor Mirko Bagaric, "rights documents are always vague, aspirational creatures and give no guidance on what interests rank the highest. This leaves plenty of scope for wonky judicial interpretation."¹⁰

The way judges "interpret" these legal rights is strongly influenced by the current political environment and their own ethical values. Given that both these factors are outside their legal area of expertise, there is no good reason why a few judges should be allowed to determine for the entire community the whole hierarchy of rights and interests. For example, explains John Gava, "judges do not have the training or skills to engage in wider debates about social or eco-

8. Alan Anderson, "The rule of lawyers: a bill of rights could lead to an elected judiciary", *Policy* (Centre for Independent Studies, NSW), Vol.21, No.4, Summer 2005-06, p. 37.
9. For a summary of these cases, see Augusto Zimmermann, "When bills of rights violate human rights", *The Australian Family* (Australian Family Association, Melbourne), Vol. 29, No. 2, July 2008. See also: Mark R. Levin, "Death by privacy", *National Review Online* (New York), 14 March 2005.
10. Mirko Bagaric, "Your right to reject the bill of rights", *Herald Sun* (Melbourne), 8 November 2005, p. 19.

conomic policy, and the courts are not appropriate institutions to carry out and evaluate the research needed for such a role".¹¹

Naturally, there is an obvious potential here for a partisan administration of justice. In practice, as far as charters of rights are concerned, this potential has become fact with the supposed neutrality and moderation of judges proving illusory. Professor Gabriël Moens writes:¹²

The possibility of attributing different meanings to provisions of bills of rights creates the potential for judges to read their own biases and philosophies into such a document, especially if the relevant precedents are themselves mutually inconsistent. Indeed, in most rights issues, the relevant decisions overseas are contradictory. For example, rulings on affirmative action, pornography, "hate speech", homosexual sodomy, abortion, and withdrawal of life-support treatment vary remarkably. These rulings indicate that the judges, when interpreting a paramount bill of rights, are able to select quite arbitrarily their preferred authorities. ... Since a bill of rights will often consist of ambiguous provisions, judges can deliberately and cynically attribute meanings to it which are different to the intentions of those who approved the bill... in Australia's case, the electorate.

The partisan interpretation of laws, as well as creating flawed court decisions, has the power to change pre-existing legislation to conform to these judicial rulings. This creates an unstable juridical environment, as even long-standing laws may be amended or even overruled. Professor Jeffrey Goldsworthy states:¹³

The traditional function of the judiciary... does not sit altogether comfortably with the enforcement of a bill of rights. In effect, it confers on judges a power to veto legislation retrospectively on the basis of judgements of political morality. ... This involves adding to the judicial function, a kind of power traditionally associated with the legislative function, except that the unpredictability inherent in its exercise is exacerbated by its retrospective nature. That is why, on balance, it may diminish rather than enhance the rule of law.

This danger has been anticipated by those who framed recent bills of rights. For example the United Kingdom Human Rights Act 1998 allows judges to declare any previously passed legislation incompatible with the act, but not to invalidate it. Parliament must decide whether the legislation must be amended or repealed. However, in practice, this well-intentioned provision has proved ineffective as the Hu-

11. John Gava, "We can't trust judges not to impose their own ideology", *The Australian*, 29 December 2008.
12. Gabriël A. Moens, "The wrongs of a constitutional entrenched bill of rights" in M.A. Stephenson and Clive Turner (eds.), *Australia: Republic or Monarchy?: Legal and Constitutional Issues* (Brisbane: University of Queensland, 1994), p. 236.
13. Jeffrey Goldsworthy, "Legislative sovereignty and the rule of law", in Tom Campbell, Keith Ewing and Adam Tomkins (eds.), *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001), p. 75.

man Rights Act still has primacy and its principal interpreters are still the judiciary. The result is a shift of political power from the elected legislature to the non-elected judiciary.

The Canadian Charter of Rights and Freedoms is regarded as a model by most human-rights activists in Australia. However, the Canadian Supreme Court has found in its “abstract” provisions “legal” grounds to invalidate all laws against the killing of babies in utero. The court has also used the charter to protect tobacco advertising, extend the franchise to all prisoners, make it harder to freeze the pay of judges than that of other civil servants, and to rewrite the marriage laws to include same-sex relationships. They have clearly read their own ideology into it and are now major political players. The clause in the charter that allows judicial review of legislation, if reasonable limits can be justified in a free and democratic society, has proved ineffective in curbing judicial activism. As Professor Moens writes:¹⁴

Since the criteria mean essentially nothing in a legal sense, judges are effectively commanded by the instrument itself to give rein to their own moral sensibilities over legal criteria in deciding the validity of legislation. In such circumstances, it is not surprising in Canada the individual social and political beliefs of the judges are considered more important than the Constitution itself.

In the United States, after striking out state laws against abortion in 1992 in *Planned Parenthood vs. Casey*, the US Supreme Court stated that abortion had become a right to liberty, thus effectively giving all parents the right to kill unborn babies. In other words, whether unborn babies live or die depends on the moral views of their parents.

The Supreme Court, having effectively decreed in this case that the question of whether unborn babies lived or died was without absolute ethical significance, proceeded to deny the legal validity of any belief based on a transcendent ethic. In his majority vote, Justice Anthony Kennedy defined liberty as “the right to define one’s own conceptions of existence, of meaning, of the universe, and of the mystery of life”.

In doing this Justice Kennedy rejected the idea that there is a Supreme Being who requires certain standards of ethical behaviour. Law Professor Gerard Bradley commented that this is akin to establishing a “new covenant” for the American people: “We will be your court and you will be our people.”¹⁵ Thus the judges and the people have obtained a right to decide for themselves what is right and wrong, providing they accept that there is no higher authority “in heaven and on earth” than the US Supreme Court.

14. Moens, *op. cit.*, p. 236.

15. Quoted in Charles Colson and Nancy Percy, *How Now Shall We Live?* (Wheaton, Illinois: Tyndale House, 1999), p. 409.

After many controversial Supreme Court decisions restricting the free exercise of religion, the US House of Representatives unanimously passed the Religious Freedom Restoration Act 1993, which aimed to re-establish a strict standard for protecting religious freedom and exercise. The legislation encountered only three dissenting votes in the Senate and was enthusiastically signed by then President Bill Clinton. If ever a piece of legislation reflected the will of the people, this did. And yet, on 25 June 1997, in the *City of Boerne vs. Flores* decision, the Supreme Court invalidated this act by considering this legislation “majoritarian intolerance”. As law professor Mark Tushnet explained, the court denied Congress “any role in offering an interpretation of the entrenched right of religious liberty that differs from the Court’s interpretation”.¹⁶

4) A federal charter of rights may weaken Australia’s democracy

The delicate balance of power between the judiciary and the legislature that is basic to a functioning democracy has been jeopardised by human rights laws, especially in countries whose legal sys-

tem is based on common law. Indeed, the legal philosopher Jeremy Waldron believes that judicial enforcement of a bill of rights is utterly inconsistent with the ability of ordinary citizens to influence decisions through democratic political processes. Waldron says:¹⁷

If we are going to defend the idea of an entrenched Bill of Rights, put effectively beyond revision by anyone other than the judges, we should ... think [that] ... even if you ... orchestrate the support of a large number of like-minded men and women and manage to prevail in the legislature, your measure may be challenged and struck down because your view of what rights we have does not accord with the judges’ views.

A federal charter of rights would require Australian judges to decide questions of policy which in a democracy should be decided by the parliament. Since this would empower the federal courts to give a final decision on important matters of social policy, these judges would be appointed not so much for their legal ability as for their political and ideological affiliations. There would be “a great temptation to appoint judges whose views on those questions of policy are views of which the executive government approves”.¹⁸ According to Gibbs:¹⁹

16. Mark Tushnet, “Scepticism about judicial review: a perspective from the United States”, in Campbell, Ewing and Tomkins (eds), *op. cit.*, p. 373.

17. Jeremy Waldron, “A rights-based critique of constitutional rights”, *Oxford Journal of Legal Studies*, Vol. 13, No. 1, Spring 1993, pp. 50-51.

18. Sir Harry Gibbs, “Does Australia need a bill of rights?”, *Proceedings of the Sixth Conference of the Samuel Griffith Society* (17-19 November 1995, Melbourne, Victoria), Vol. 6, Chapter 7, at: <http://www.samuelgriffith.org.au/papers/html/volume6/v6chap7.htm>

19. *Idem.*

[T]he circumstances surrounding some judicial appointments in the United States show that it has often been impossible to resist this temptation. Thus one of the essentials of a free society — an independent judiciary — tends to be weakened when the judges are given what virtually amounts to political power.

Naturally, the supporters of a federal charter of rights may argue that, since it is enacted by a government elected by a majority of voters, this makes any judicial invalidation of statutes democratic. However, the establishment of what might in effect become a judicial dictatorship, even if done by democratic means, effectively weakens democracy and the rule of law. As Waldron points out, a bill of rights amounts to “voting democracy out of existence, at least so far as a wide range of issues of political principles is concerned”.²⁰

5) A federal charter of rights may undermine Australia’s federalism

In the act of interpreting the abstract provisions of a federal charter of rights, the High Court of Australia would be able to impose uniformity and coast-to-coast dispositions on the most important areas of law, thus allowing the court to make the right

to life, or to freedom of religion or association, or to be secure against unreasonable searches, to mean exactly the same thing in every state.

According to Professor James Allan, “a bill of rights will fall ultimately to be interpreted by the High Court, by Commonwealth-appointed judges. So such ... instruments will increase the power of centrally-appointed judges, which can be thought of as a sort of centralising effect”.²¹ So, in that sense, a federal bill of rights may engender a sort of centralising effect that could further erode the country’s federal system. As Gibbs pointed out:²²

Under the Constitution, any State legislation which was inconsistent with a Commonwealth bill of rights would be inoperative. A Commonwealth bill of rights would be likely to have the effect of imposing extensive restrictions on the exercise of State rights and powers. However much inconvenience or damage might be shown to result, a State could not remedy the situation. We have already seen how State legislation, which would have extinguished the native title successfully claimed by the plaintiffs in *Mabo v. Queensland (No.2)*¹⁹ was held by a majority of 4 to 3, to be inconsistent with the Racial Discrimination Act. If the Commonwealth Parliament enacted a bill of rights in the wide terms of some of the existing drafts, the effect on the States would be serious indeed.

20. *Op. cit.*, p. 46.

21. James Allan, “Bills of rights as centralising instruments”, *Proceedings of the Eighteenth Conference of the Samuel Griffith Society* (26-28 May 2006, Canberra, ACT), Vol. 18, Chapter 5, at: <http://www.samuelgriffith.org.au/papers/html/volume18/v18chap5.html>

22. Gibbs, “Does Australia need a bill of rights?”, *op. cit.*

6) A federal charter of rights may lead to a more litigious society

A federal charter of rights would allow existing laws to be challenged, encouraging speculative and frivolous legal actions. To date, generally speaking, legislation enacted by the democratic process has required majority support in the community.

However, human rights legislation gives minority groups an unprecedented opportunity to impose their will on the majority. Professor Moens writes: "Those who favour a bill of rights may delight in the vagueness of these documents, for they sometimes assume that its very ambiguity will enable them to achieve through judicial decision, what they have been unable to achieve through Parliament." This has clearly happened in Canada where "litigious floodgates have been opened and courts have been strained by the overload".²³

7) A federal charter of rights may make people more selfish

Those who consider that poverty and criminality are products of flawed social structures believe that human rights legislation will bring about

positive change. However, as legislation cannot change the human heart where our problems are centred, such a hope is ill founded. Thus the English political commentator Peter Hitchens observes the following phenomenon happening in his country:²⁴

The highest level of crime in memory has occurred at a time of unheard-of prosperity, health, social welfare, provision, good housing and material contentment. This destroys the idea that increased welfare leads to a reduction in crime. On the contrary, it raises the possibility that well-meaning state intervention to improve the lot of the poor can actually lead to increased crime. It is decay and destruction of moral values and self restraint ... that have led to the misery of the modern poor.

The decline of Christianity in the West has been accompanied by a lowering of ethical standards with a consequent rise in criminal behaviour. This, coupled with an increased emphasis on rights without balancing responsibilities, is producing an ethical culture increasingly resistant to the respect and enforcement of our most basic individual rights to life, security and property. It is disturbing that some Australian organisations pushing for more "group rights" display little interest in the corresponding necessary individual responsibilities. Bill Muehlenberg comments:²⁵

23. Moens, *op. cit.*, p. 238.

24. Peter Hitchens, *The Abolition of Liberty: The Decline of Order and Justice in England* (London: Atlantic Books, 2003), p. 23.

25. Bill Muehlenberg, "What is wrong with a bill of rights?", *News Weekly* (Melbourne), 13 August 2005, at: http://www.newsweekly.com.au/articles/2005aug13_c.html

A bill of rights will certainly encourage people to demand rights, but will be unlikely to enjoin them to uphold obligation and responsibility. Indeed, rights claims can be used to cover almost anything, with a never-ending stream of new rights being discovered and demanded. ... Individual responsibility, virtue and self-control are the means by which a democracy flourishes and rights are respected.

8) A federal bill of rights may lead to the assumption that our basic rights are not God-given but government-authorized

My final point is of particular relevance for those who profess to be Christian. For them, basic human rights should not be considered creations of parliament but gifts of God. John Stott says: “We received them with our life from the hand of our Maker. They are inherent in our creation.”²⁶

The enactment of a federal charter of rights may lead to the wrong assumption that the state is the ultimate creator of our basic rights. If the state replaces God as the ultimate authority for right and wrong, the state becomes a “god” unto itself and it is enthroned as the all-powerful ruler over the life, liberty and property of the people. It is really the case of saying: “The State

gives, the State takes away; blessed be the name of the State!”

The whole common law system has been historically based on the premise which puts God, not the government, as the ultimate creator of every true right and liberty. And as our lives are a gift of God, we have no inherent right to dispose of it as we appraise but are accountable to God for all our personal choices and actions. Law Professor Gary T. Amos writes:²⁷

Men have rights, such as the right to life. But because man has a duty to live his life for God, the right is alienable. He can defend his life against all others, but not destroy it himself. No man has the right to do harm to himself, to commit suicide or to waste his life. He has a property interest — dominium — in his own life, but not total control.

According to the Christian world-view, God created human beings in His image and likeness, commanding them to fill the earth and to subdue it. Based on this principle, America’s founding fathers thought that all people receive their most basic rights directly from the hand of their Creator, not the State. Thomas Jefferson, the author of the United States Declaration of Independence, asked rhetorically: “Can the liberties of a nation be secure when we have removed their only secure basis, a conviction in the minds

26. John Stott, *New Issues Facing Christians Today* (London: Harper-Collins, 1999), p. 172.

27. Gary T. Amos, *Defending the Declaration* (Brentwood, Tennessee: Wolgemuth & Hyatt, 1989), p. 109.

of the people that these liberties are a gift of God?"²⁸

In this sense, God is understood to have given us life and laws by which we should order our lives. These laws are more important than any legal right, which certainly ought not to be inconsistent with them. So when courts deny the existence or relevance of these higher laws, and by their enactments allow people to live in opposition to them, the fabric of society begins to unravel.

Conclusion

Human rights legislation is unnecessary in a constitutional democracy like Australia and, when introduced, will upset the balance between the legislature and the judiciary, giving the latter more power. Rights legislation, being general in nature, needs interpretation, but there is little legal guidance to assist in this process. The outcome depends largely on the ethical views of a few judges, thus providing a mechanism by which an intellectual elite can force its values on

an apathetic or reluctant majority. As well, the modern emphasis on group rights discriminates against non-favoured groups and diminishes the more fundamental individual rights. In the community in general, it not only leads to increased litigation and irresponsible and selfish behaviour, but also leads to the wrong assumption that the government is the ultimate creator of our basic rights.

There is no good reason why Australia needs a federal charter of rights and every reason to believe it will seriously damage democracy and those constitutional mechanisms which up until now have prevented the concentration of power in the hands of a few.

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28. Cited in R.J. Rushdoony, *The Politics of Guilt and Pity* (Fairfax, Virginia: Thoburn Press, 1978), p. 135.