Against constitutional cringe: the protection of human rights in Australia

Daryl Williams*

Efficacy of current arrangements

While not perfect, Australia has an excellent human rights record. This is the result of a constitutional, democratic and legal framework which has served us exceptionally well for more than a century. My fellow panel members may try to persuade you that a Bill of Rights is something that we desperately need. But let there be no doubt about the effectiveness of the arrangements that are already in place. These arrangements have helped make Australia the free, fair and just society that it is today. They have promoted and protected human rights over many years and in a variety of different circumstances. They are both strong enough to provide firm protection for the rights that are fundamental to a modern democratic society, and flexible enough to respond to the needs of changing times.

I am proud to be the First Law Officer of a free and democratic country where human rights protection is first class. I am a proud supporter of the system that has given us stability and security and has fostered a community where tolerance, fairness and equality are valued, respected and protected. And I am convinced that there is no need for a Bill of Rights in Australia. Those who advocate a Bill of Rights undervalue the strengths of the arrangements that have served us so well and that are such an important part of our social fabric. Australia has a unique combination of strong democratic institutions and constitutional, common law and statutory protections for human rights. These protections are the envy of many countries throughout the world.

Strong democratic institutions

Our democratic institutions are the bedrock of human rights protection in Australia. We have a democratically elected Parliament — including a Senate that is a vigorous check on the Executive and a spirited protector of rights. This has been shown by recent Senate Committee examination and debate on the Government's proposed counter-terrorism legislation. In fact, the counter-terrorism legislation is a useful example, of which I will say more later. We also have an accountable Executive

* The Hon Daryl Williams AM, QC, MP is the Federal Attorney-General.

Government. And a judiciary which upholds the rule of law, and whose independence is constitutionally protected and staunchly defended.

These three arms of Government constitute a powerful triumvirate that protects our individual rights and liberties. The framers of our Constitution put great thought into the issue of human rights. They consciously put their faith in the capacity of parliamentary democracy to protect individual rights. And they consciously decided not to import a US style Bill of Rights into the Australian Constitution. I share this faith in the ability of our parliamentary democracy to defend individual rights. And with the benefit of hindsight, I think it is clear that the decision to rely on democratic institutions rather than a Bill of Rights was a good one.

Constitutional and common law protections

Australia's strong and democratic institutions are complemented by a number of specific constitutional and common law protections for human rights. The Australian Constitution specifically protects certain rights and freedoms. These include, trial by jury, freedom of religious association, prohibition on discrimination on the basis of State residence, freedom of interstate trade and commerce, and just terms for acquisition of property.

In recent years the High Court has focused on the democratic principles enshrined in the Constitution. It has held that there are implied rights in the Constitution such as the implied right to freedom of political communication. Indeed the common law protects rights in many ways. This is illustrated by a number of high profile cases. A decade ago the High Court identified a common law right to a fair trial in *Dietrich*. And *Mabo* — which reached its 10th anniversary this year — was a watershed case in common law protection of rights. *Mabo* rejected the doctrine of *terra nullius* in Australia. In doing so it demonstrated that common law can constantly evolve to protect rights. For centuries the common law has played a major role in the protection of existing and emerging rights. There is no reason to think that this will not continue. The constructive interaction between common law and legislation will also continue. Ultimately it will continue to be the role and responsibility of the elected Australian legislatures to give expression to contemporary notions of justice and human rights.

Commonwealth, State and Territory anti-discrimination laws

The protection of human rights extends beyond our democratic traditions and constitutional and common law protections. Building on this firm foundation,

Australia has a range of bodies charged with the protection and promotion of human rights. We have an independent national human rights institution — the Human Rights and Equal Opportunity Commission. And strong anti-discrimination laws to protect human rights. At the federal level there are specific Acts which make it unlawful to discriminate on the grounds of sex, race or disability. And the Government intends to put in place legislation to prohibit discrimination on the basis of age. Complaints can be made to the Commission about unlawful discrimination. It also handles complaints about breaches of human rights under seven international instruments. These include the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.

Australia is also served by a Federal Privacy Commissioner. Australia's privacy laws are among the best in the world. They have recently been extended to guide the way in which the private sector collects, uses and stores personal information. Anti-discrimination laws are an accepted part of the Australian political landscape. The strength of Australia's anti-discrimination laws is not limited to the federal level. Each State and Territory has its own set of comprehensive anti-discrimination laws. And each has an independent body and senior statutory office holder charged with protecting and promoting human rights. At all levels, the laws operating today are making a practical contribution to the protection of human rights. They have successfully shifted attitudes and community behaviour. This is the real business of human rights protection.

Education and the Human Rights and Equal Opportunity Commission

It is important to have a strong human rights framework in place. And we do. But this framework is only as strong as the support and acceptance it receives from the broader community. Human rights, and the institutions that uphold them, are rendered meaningless unless they are understood and accepted by the community. Human rights must be part of the fabric of our community — and education is the key to achieving this. Ignorance is a constant threat to human rights. It breeds discrimination, intolerance and prejudice. If we are serious about human rights, we must address ignorance in all its forms.

The Human Rights and Equal Opportunity Commission plays a vital role in helping people to understand and accept their roles and responsibilities in the ongoing protection of human rights. I applaud the Commission's work in this area. The Commission was recently short-listed for a national education award in recognition of its 'Youth Challenge Online' website. The students here today may be interested to know that Youth Challenge Online provides helpful human rights resource materials for schools. Human rights education is a matter for everyone. That is why

the Government supported the establishment of the National Committee on Human Rights Education in 1998. This Committee provides a forum for representatives from non-government organisations, government agencies, community bodies, businesses and the media to discuss and implement initiatives dealing with human rights education. And it demonstrates that all sectors of the community have an important role in promoting education about human rights.

Australia's proud international record

Australia's commitment to human rights also extends to the international stage. We are party to the major international human rights instruments. And we take our international responsibilities very seriously. There have been suggestions that Australia needs to have a Bill of Rights in order to fulfil our international obligations. This is absolutely not the case.

Pitfalls of a Bill of Rights: balance of power

Far from enhancing human rights, a Bill of Rights would actually have a number of negative consequences. Australia has a unique balance of political power. We have three distinct but interrelated arms of Government at the Federal level. And we have a division of responsibilities between the Federal Government and the States. The delicate relationships between each of these bodies would be fractured by the imposition or addition of a statutory or constitutional Bill of Rights. It would upset the balance of human rights protections already in place.

Pitfalls of a Bill of Rights: policy functions of Parliament and Executive

Introducing a Bill of Rights would also be an abdication of policy responsibility by the Executive and the Parliament. It is the duty and the role of the Executive and the Parliament to make decisions on behalf of the community. They are elected by the people, they implement the wishes of the people and ultimately they are answerable to the people for the decisions they make. If Australia were to introduce a Bill of Rights, responsibility for determining complex competing policy questions would be shifted away from the Executive and the Parliament to the judiciary. A strong, professional and independent judiciary that upholds the rule of law is one of the bulwarks of a free and democratic society. But the judiciary is not best placed to determine policy.

Identifying universal rights and balancing them against the rights of the individual is always a complex task. For example, the balancing act of protecting privacy while allowing for individual freedom of speech is best performed by government

legislating on the basis of an informed policy position, rather than on a case by case basis in the courts. The Parliament and the Executive are best placed to determine these types of policy matters. And those who advocate a Bill of Rights and an enhanced policy role for the judiciary should note that betting on the judiciary delivering certain outcomes is a mugs game.

Experience in other countries indicates that judicial interpretation of the protection afforded by a Bill of Rights is as likely to result in a diminution of rights sought to be afforded by parliament as it can an expansion of such rights. This is because defining rights is a balancing act. Competing rights must always be balanced. That is unavoidable. Granting primacy to some rights in a codified way can operate to exclude the possibility of protecting other rights in ways which cannot necessarily be foreseen and very often are clearly unintended and out of step with community standards.

Pitfalls of a Bill of Rights: response to change

This highlights another problem with an entrenched Bill of Rights — it does not allow change over time. The ongoing and meaningful protection of human rights depends on having arrangements in place which can respond to changing community needs and concerns. An entrenched Bill of Rights along the lines of those in the US would 'freeze' values. If a Bill of Rights had been constitutionally enshrined at Federation we could well have been burdened by a Bill that might seem anachronistic and inappropriate in the 21st century. This was made evident in the fact that the Government's leadership in establishing the National Firearms Buyback Scheme was not hampered by a constitutional entrenched right to bear arms. This would have been the case in the US.

A Bill of Rights to protect minority groups

A common argument put forward in support of a Bill of Rights is that one is needed to fill gaps in human rights protections and to protect minority rights. In response, I simply repeat my point. It is the role of the Executive Government and the Parliament to identify and remedy those gaps. Where they are fundamental to our democratic system of government, the High Court has demonstrated that they are protected by our Constitution, even if they are not expressly stated. Members of Parliament are in close contact with their constituents, and are best placed to deliver fair and just results for all members of the community. No one could seriously suggest that the Senate in particular does not take this responsibility very seriously. We must focus on practical outcomes. Time and time again it is the Executive and the Parliament who will deliver practical and meaningful outcomes for human rights.

Our democratic institutions serve us well and they will continue to represent the interests of minority groups.

A good example of this is the way the Government is working to ensure that people with a disability are able to fully participate in public life. We recently announced changes that will give more support and opportunities to people with disabilities to help them participate in the workplace. The Government is also putting in place comprehensive Disability Standards, covering access to public transport, premises and education. The Government's work on the Disability Standards is a good example of how government, in concert with the community itself, is best placed to effectively respond to and meet the needs of the disadvantaged.

Out of step or constitutional cringe?

A Bill of Rights might sound attractive. But in practice it would be a much less effective way to protect and promote the rights of those in need. One argument gaining momentum for a Bill of Rights is that Australia is in some way 'out of step' with the international community. It is true that the UK, New Zealand and Canada each have their own particular version of a Bill of Rights. But this does not automatically mean that Australia must rush out and get one. It is a bizarre kind of constitutional cringe to say that Australia should have a Bill of Rights simply because our common law cousins have them. Australia has its own unique circumstances — and in no way do these circumstances necessitate a Bill of Rights. I would challenge those who advocate the need for such a Bill of Rights here to demonstrate that those countries are less discriminatory, fairer, more just or free than Australia because they have a Bill of Rights. I am confident they will fail in the attempt because it is simply not the case that our system somehow lacks by comparison.

We have responsible government. We have a robust parliamentary democracy. We have an elected Senate that is a check on Executive power and protector of individual rights. We have a federal system, which provides another check on Executive power and protection for rights. We have strong anti-discrimination laws. We have the common law. We have our own unique written constitution, which provides both express and implied protection of rights. And we have a passionately free press. These are ample protections for human rights. There is simply no need for a Bill of Rights.

Supporters of the Canadian, New Zealand and UK models overlook the fact that the local conditions in each of these countries are quite different from the conditions in Australia. New Zealand has no written constitution. The Canadian Senate is appointed. And similarly, the House of Lords in the UK is unelected. These are

significant differences in our respective political systems. And they have substantial implications for the sort of human rights protections that are needed. If you appreciate these differences, the argument that Australia should have a Bill of Rights — because it is 'out of step' with the international community — is weakened considerably.

Counter-terrorism amendments: a case study against a Bill of Rights

The often robust exchanges between the Government and the Parliament demonstrate the strength of the checks and balances that are in place to protect human rights. This has been no clearer than in the course of the recent development of the counter-terrorism package of legislation. Following the devastating events in the US last September, the Government conducted a thorough review of Australia's existing security and counter-terrorism arrangements. A number of gaps were identified in our legislative framework. In response, the Government developed a major package of counter-terrorism legislation. Anti-hoax legislation has already been passed by the Parliament. Another six Bills are currently before the Parliament.

These Bills include measures as diverse as aircraft security and suppression of terrorist financing. They introduce new offences relating to terrorist acts. A separate Bill gives the Australian Security Intelligence Organisation (ASIO) new powers to make sure that they can identify terrorist activities and hopefully prevent them before they occur. They also allow for the investigation of terrorist offences. In developing these counter-terrorism laws the Government has worked hard to protect civil liberties. This has involved a difficult and delicate balancing of competing policy imperatives. On one hand we need to bolster Australia's capacity to combat terrorism. On the other hand we need to ensure civil liberties remain protected. I can assure you from personal experience that the counter-terrorism Bills have been subjected to extensive and robust parliamentary scrutiny. As part of this scrutiny, the community has had ample opportunity to express its views and to air any misgivings.

The Senate Legal and Constitutional Legislation Committee reported on most of the package in May 2002 and the ASIO Bill in December. And the Parliamentary Joint Committee on ASIO, the Australian Security Intelligence Service and the Defence Signals Directorate reported on the ASIO powers amendments earlier this month. The outcome of this extensive and detailed analysis was that both committees recommended that the Government modify the counter-terrorism proposals. Several of the proposed changes related directly to civil liberties issues. I stand by the view that the Government's original package struck a fair balance between these imperatives. But I respect the committee process and I respect the concerns that were

put forward. As a parliamentarian and as a lawyer I consider that process to be an important and useful part of our democratic system.

The Government has always been willing to consider reasonable recommendations that can improve the legislation without undermining its main purpose — that is the protection of the community from terrorism. Indeed, even if the Government were 'unwilling' to do so, our parliamentary system ensures that it has little choice but to take seriously the concerns of elected representatives. As I announced on 4 June, the Government has taken on board concerns raised by the Senate Committee and others. And it has agreed to introduce a number of additional safeguards for civil liberties that do not lessen the overall effect of the legislation. We have come out of this exhaustive process with a strong set of Bills to bolster the safety and security of the Australian community.

The Government has also indicated that it will be amending the ASIO Bill in line with the recommendations of the Parliamentary Joint Committee on ASIO. We gave serious consideration to the Parliamentary Joint Committee's recommendations — in the same way the Government responded to the Senate Committee's recommendations. The details are still being finalised but I am confident that the outcome will be strong legislation that strikes an appropriate balance between the need for security and to protect civil liberties.

The development of the counter-terrorism amendments shows that the Executive and the Parliament are well equipped to resolve the major contested issues of public policy. The capacity of the courts is intrinsically limited in this regard. A court can only ever consider the aspects of a matter that are litigated before it. This may mean that the crux of a public policy issue may not even be before the court. And of course there are the costs involved in protracted litigation. In contrast, the Executive and the Parliament are responsible to the public and we must and we do listen and respond to community concerns. The political process — not the judicial process — can comprehensively address the full range of issues in the most effective and responsive way.

That said, our Constitution clearly sets parameters as to the form and breadth that legislation such as the counter-terrorism package can take. And judicial scrutiny of Executive and Administrative authority exercised under such legislation is an essential protection which our system affords us. The legislation is drafted having regard to that promise of oversight. And those that exercise power under it do so in the knowledge that their actions can be scrutinised and tested.

I understand that the Democrats intend to tack a Bill of Rights onto the

Government's counter-terrorism legislation. This is no way to make public policy. Rather than grapple with the detail of complex and competing policy considerations, the Democrats would have the Government and the Parliament simply transfer these problems to the courts. This is not the right approach. It would result in an ad hoc and — by its very nature — incomplete and unsatisfactory resolution of only some of the issues needing to be addressed.

Conclusion

Australia does not need a Bill of Rights. The arrangements we have in place are the right arrangements. They suit our unique political and constitutional situation. And they have served us well for many years. We have a human rights record the rest of the world envies. We live in a society that values liberty and equality. And we live in a society that respects everyone's right to justice and a fair go. All of this has been achieved without a Bill of Rights — and it will be maintained without a Bill of Rights. ●

References

Australian cases

Dietrich v R (1992) 177 CLR 192

Mabo v Queensland (No. 2) (1992) 175 CLR 1

Australian legislation

The Commonwealth of Australia Constitution Act 1900 (Cth)