Bill of Rights and international standards

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Introduction

The decision whether or when Australia will decide to have a Bill of Rights is not likely to be made solely on the basis of our international human rights commitments. It will be made primarily on the basis of domestic issues, when the factors in favour such a move are, finally, seen by the community to outweigh the supposed negative factors.

Nevertheless, it is hardly possible to contemplate such a step without having regard to the international and comparative dimensions involved. Proposals for a Bill of Rights for Australians inevitably involve reference to international human rights standards, which incorporate universal ideas of what rights are and how they should be protected.

My own viewpoint on these issues has been influenced by my experience examining the laws of many different countries to assess their compliance with international human rights standards.

The questions as I see them are: first, do we want universal principles of human rights to govern the relationship between government and public authorities on the one hand and individual Australians on the other? Second, who should we trust to be the guardian of these principles: the people generally, their elected representatives, the Executive, the independent judiciary or the treaty bodies?

There are many arguments to make for and against a Bill of Rights. I will deal only with those issues which have an international dimension.

International obligation

One argument in support of a Bill of Rights is that Australia has voluntarily undertaken the obligation to give effect to certain human rights treaties, and a Bill of Rights is necessary to give effect to those obligations.

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I refer mainly to the International Covenant on Civil and Political Rights (the Covenant or ICCPR), though in all there are six major conventions at issue. Australia has undertaken 'to adopt such legislative or other measures' as are necessary to give effect to Covenant rights. It has also agreed to ensure *effective and enforceable remedies* where rights are violated (ICCPR: art 2). Although judicial remedies are not mandated by the Covenant, it states a preference for these to be developed (ICCPR: art 2(3); see also art 14(1)).

Governments have considerable leeway as to how they implement those obligations. There is a role for all branches of government in this. However, when it is claimed that individual rights have been violated, this calls for a determination, and the granting of enforceable remedies. That is a function for independent and impartial courts. But it is not a function they can exercise in Australia.

Australia has failed to make the principles of the Covenant directly enforceable in Australian courts, a situation which has drawn criticism from the UN Human Rights Committee, the body monitoring compliance with the Covenant. The Committee observed, in 2000, that in the absence of a constitutional Bill of Rights, or a constitutional provision giving effect to the Covenant, there remain areas in which the Australian domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated (concluding observations on Australia, July 2000).

The Attorney-General's response to the Committee at the time was that we protect rights through a combination of our strong democratic institutions, the common law and an extensive array of statutes and programs at the Commonwealth, State and Territory level. This fits our circumstances, he said, and is highly effective.

The official view is that our rights are well protected, and that executive or legislative remedies can be provided where needed. But there are gaps; the anti-terrorist legislation suggests that it is unwise to rely on the executive to protect rights, and that parliamentary protection may not be sufficient to prevent every abuse.

Gaps have been revealed in the international fora

Although Australia has not conferred jurisdiction on our courts in respect of international human rights standards, other than in relation to discrimination, it has accepted the competence of the Human Rights Committee and other treaty bodies, Committee on the Elimination of Racial Discrimination (CERD) and the Torture Committee, to determine whether Australia has violated individual rights under their instruments. Those Committees have found gaps in the protection of our rights.

Most people who approach the treaty bodies with their complaints have had no opportunity to have their issue considered directly by any court in Australia.[1] For example, no remedy was available to Mr Toonen in respect of Tasmania's anti-gay laws until he went to the Human Rights Committee (*Toonen v Australia* 1994); the Government responded to the Committee's finding of violation by enacting legislation in 1994 (HRC Report 1994: 226; *Human Rights (Sexual Conduct) Act 1994* (Cth)). That was the high water mark of Australia's willingness to accept the views of a treaty body,

The *A* case (1993; HRC Report 1997: 125) and *Winata* (2000; HRC Report 2001) are further examples showing the lack of remedies in Australia for violations of rights. In the *Elmi* case (1998), the complainant had to ask the Torture Committee to prevent his removal to a situation where he might be exposed to torture, as Australian courts had no jurisdiction to deal with that issue.

Australia does not take seriously the decisions of treaty bodies

There might be less demand for a Bill of Rights if Australia took seriously the opinions of the treaty bodies and responded appropriately when they have determined that there has been a violation of rights. The views of the treaty bodies are not binding but they should have considerable moral force.

The Australian Government chooses, however, to assert that its own view of the matter is better than that of the treaty body whose competence it has accepted. The Government maintains this opinion, with perfect confidence that no court in this country can express a contrary view, because it has ensured that no court has jurisdiction to consider the matter. By rejecting the treaty body determinations and by denying jurisdiction to domestic courts when an individual seeks to vindicate rights we have promised to protect, the Executive in a sense usurps a function which should belong to an independent judiciary.

In my opinion, it would seldom be necessary to complain to the UN Human Rights Committee if Australia allowed individuals to seek the *effective remedies* which the Covenant requires in our own jurisdiction. Under the constitutional separation of powers, effective and enforceable remedies can be provided, at the Commonwealth level anyway, *only* through judicial determinations or by legislative enactment (*Brandy v HREOC* 1995).

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1 High Court judges considered this situation as curious (*Dietrich v R* 1993).

We can contrast our situation with that of the UK, where the numerous violations found against it by the European Court of Human Rights were a factor inducing the Government to bring rights home, by enabling domestic UK courts to determine rights issues directly under the *Human Rights Act*.

To summarise, there is an argument to be made on the basis of giving effect to our international obligations. Needless to say, in the current political environment, such arguments are not likely to win much favour from a government that is hostile to multilateral obligations and only too willing to be critical of the treaty body process.

Comparison with peer group of countries

There are also arguments for a Bill of Rights on comparative grounds. Virtually all EU countries have entrenched rights, and most have incorporated the European Convention on Human Rights.

Other common law countries with comparable backgrounds have entrenched constitutional Bills of Rights or legislative protection of rights. For example, the United States Bill of Rights and the Canadian Charter of Rights and Freedoms are entrenched at a constitutional level.

New Zealand has a legislative Bill of Rights to protect human rights and affirm its commitment to the ICCPR. The UK has its own *Human Rights Act*, giving effect to the European Convention on Human Rights. The Hong Kong Bill of Rights follows the Covenant very closely.

A new starter in the democratic stakes, South Africa, has its own entrenched Bill of Rights, including economic and social rights. The argument here is that Australia is out of step, and that the development of our legal system will become more and more isolated from developments in those other countries with which we have previously had a continuing exchange of jurisprudential ideas.

The question is sometimes posed whether such countries are more just and fair because of their Bills of Rights. The point is, however, that even in a generally just and fair society the broad brush of legislation and the extensive powers of the Executive may ride rough shod over an individual or minority. A Bill of Rights provides a means of seeking justice in such cases. At present we have no such right of recourse in many situations.

International standards influence domestic protection of rights

Opponents of a Bill of Rights often argue that human rights are vague and alien concepts, devised by faceless bureaucrats in far away places. They need to be reminded that the international human rights standards are themselves drawn from the experience and understanding of many different countries which take part in their drafting. Australia itself contributed to the drafting of the International Bill of Rights and to other human rights instruments

Furthermore, international human rights standards are incorporated or reflected in many national constitutions or Bills of Rights. They have had a significant influence on the domestic laws of many countries. Australian law already incorporates some important international standards into its anti-discrimination laws.

Starting with Lionel Murphy's Human Rights Bill of 1973, there have been seven attempts to introduce a Bill of Rights in Australia at federal level; proposals have also been considered in three States and in the ACT. These have drawn mainly on the ICCPR.

In my view, the aim of a comprehensive Bill of Rights should be to ensure that our laws and practices are in compliance with universal human rights standards and to ensure that Australian courts can provide appropriate remedies in case of violation of rights.

This would, incidentally, overcome the objection made by some people that these issues are at present determined offshore in Geneva. They are Australian issues and they should be determined here.

There are a number of issues to resolve in deciding on a particular form for a Bill of Rights, and some of these have an international dimension.

Legislation or entrenchment?

The decision whether to press for a constitutionally entrenched Bill of Rights or a legislative one will be made on pragmatic grounds, in accordance with political pressures and necessities. Those (like me) who prefer, at least initially, a legislative Bill of Rights at Commonwealth level understand that such a Bill would have to rely largely on the external affairs power and would have to be '... reasonably capable of being considered appropriate and adapted to implementing the treaty' (Tasmanian Dam case 1982; *Industrial Relations Act* case 1996).

There is enough leeway to allow for a Bill of Rights based on the Canadian model, or that of New Zealand.

If the Bill of Rights were advanced as a Constitutional amendment, there would be considerable freedom to depart from existing models. However, the greater the departure, the less value would attach to precedents from other jurisdictions, and the greater the uncertainty as to outcomes.

Prevention, remedies and later inconsistent legislation

The ideal objective of a Bill of Rights should be to promote respect for rights and freedoms. Preventing violations of rights is just as important as dealing with their consequences. This requires co-ordinated and continual monitoring by all branches of government of their own actions and decisions to ensure they are in compliance with rights standards.

The treaty bodies are continually disappointed by the failure of States to inform and educate the community about human rights and about the views expressed by the treaty bodies about their governments. A Bill of Rights should reinforce the need for effective education for human rights.

An Australian Bill of Rights should follow the Canadian model, and empower the courts to give whatever remedies are considered appropriate and just in the circumstances.[2] This would enable Australia to comply with art 2(3) of the Covenant by providing effective and enforceable remedies.

The remedies which have been recommended by the Human Rights Committee in the case of violations of the Covenant include compensation, restitution and release from detention. Where the violation is by legislation, legislative amendment or repeal may be recommended, as was done in the *Toonen* case.

An entrenched constitutional Bill of Rights would enable the High Court to declare invalid Commonwealth and State legislation to the extent that it is incompatible with the protected rights. A legislative Bill of Rights would require a solution to the problem of later Commonwealth legislation incompatible with protected rights.

The New Zealand Bill calls for enactments to be given a meaning that is consistent with the rights and freedoms in the Bill of Rights, s 6. But in some cases it has proved impossible to read legislation as compatible with the Bill of Rights. The only remedy available in such a case would be at an international level.

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2 Constitutional Commission, Final Report, 1988, para 9.235, based on Canada s 24(1).

The Canadian Bill of Rights of 1960, which pre-dated the Charter, had a different and, it seems, more effective means of binding future parliaments by providing that later laws should not abrogate the Charter unless expressly declared to operate notwithstanding the Bill of Rights.[3]

It is not entirely clear whether this solution would work for Australia, though I am cheered to learn that George thinks it would (Williams: 267 and following).

The UK model puts the onus on government to respond to a decision by the courts that legislation is incompatible with rights and freedoms.

States

The question whether States should be bound by a Bill of Rights also has to be considered.

Choices to be made about rights

What to leave out, what to bring in

What rights should be included in a Bill of Rights? Should it cover all rights in the Covenant, or not? Are there other rights not included in the Covenant which should go into a Bill of Rights?

I would consider protection of the rights and freedoms of the ICCPR as the minimum starting point for a Bill of Rights. This would ensure that determinations about Covenant rights can be made in Australia and thus limit the potential for cases to be taken to Geneva.

But is that enough? Despite its potential for protecting the cultural rights of minorities the Covenant does not refer expressly to the rights of indigenous people.

The Canadian Charter recognises and affirms the existing aboriginal and treaty rights of the aboriginal people of Canada, s 35, though these remain far from settled. New Zealand has its Treaty of Waitangi. We need a solution for indigenous rights.

What about economic and social rights, which are binding on Australia under the

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3 Exposure report, Senate Committee, 1985, p 56, citing *R v Drybones* 1970 SCR 282.

Covenant on Economic, Social and Cultural Rights? Should these be recognised in a Bill of Rights? In 1988, the Australian Constitutional Commission (at para 9.151, 152) excluded economic and social rights from their Bill of Rights, as they preferred to include only those rights which they thought were apt for judicial enforcement. They would also have excluded the right to life, to property, freedom of contract, privacy, family rights, as they might be highly controversial or give rise to sharp differences of opinion.

The South African Bill of Rights includes trade and occupation rights, labour relations, housing, health care, education, language and culture. The Constitutional Court has applied the provisions on health and housing.

Despite the difficulties, I believe that consideration should be given to including these rights because of their importance to indigenous Australians.

Drafting rights, uncertainty and precedent

How should the rights be framed? Should they follow closely the wording of international instruments or that of other national Bills of Rights?

Opponents of a Bill of Rights argue that a Bill of Rights would introduce too much uncertainty because of the broad terms in which rights are usually drafted in international treaties.[4] Such arguments take little account of the jurisprudence of international bodies, or that of countries which have adapted human rights standards to the needs of their own legal systems. Drawing from a existing models would open up access to jurisprudence interpreting and applying their provisions and reduce the uncertainties which might arise from a completely new version of rights.

However, it is important to study closely how the provisions used as precedents have been interpreted and applied.

Different effects of drafting

For example, the specific formulation of art 7 of the Canadian Charter enabled at least some Justices of the Supreme Court to dissent in the *Rodriguez* case (1994), and

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4 The Australian Constitutional Commission recommended in 1988 that an entrenched constitutional Bill of Rights should be modelled on the Canadian Charter, partly to reduce the uncertainty which might arise by drawing its model from a country with a similar legal systems and constitutional traditions (Final Report, para 9.117).

to find that the rights of a terminally ill claimant were violated by laws which made assisting suicide a criminal act.[5] Her personal autonomy in matters of life and death had been unfairly limited, according to the minority decision. The majority decided that the limitations were not arbitrary or unfair.

Article 7 of the Canadian Charter: 'Everyone has the right to life, liberty and security of the person and the right not be deprived thereof except in accordance with the principles of fundamental justice.'

In the comparable UK case of *Pretty*, the House of Lords noted that the European Convention had no provision equivalent to art 7 of the Canadian Charter which could support the claim to personal autonomy, and that there was no jurisprudence to support the claim. Mrs Pretty failed in the House of Lords and again in Strasbourg (*Pretty v The United Kingdom* 2002).

There is no legal framework for the consideration of the extent of personal autonomy in Australia in matters of life and death, or of the fairness of restrictions on such autonomy. Nor has it been found to fall within the ICCPR, though it seems clear that laws decriminalising suicide and, in certain situations, assistance to suicide are not incompatible with that instrument (Nowak 1993: 2002).

This is just one of many issues to consider in drafting the Bill.

Interaction between jurisdictions

An Australian Bill of Rights would open the way for Australian courts to join in the development of human rights jurisprudence, which is now flourishing in countries like New Zealand, Canada and the UK with which we have traditionally exchanged jurisprudence. The globalisation of human rights can as readily be advanced by domestic jurisdiction as by international bodies.

Canadian experience: deportation to risk of torture

A recent example from Canada, in a situation familiar to us, illustrates this. There was a challenge to the deportation on security grounds of a Sri Lankan. It had been alleged that he would be exposed to a risk of torture if he were returned to Sri Lanka, which might deprive him of the right to liberty, security and (perhaps) life protected by the Charter (*Suresh v Canada* 2002).

5 A minority of judges in Canada were of the view that the Charter was violated by the limitation imposed on the applicant.

The Court brought together in its consideration not only the Charter provisions, but also the ICCPR, the Convention against Torture and relevant provisions of the Convention Relating to the Status of Refugees, in deciding that exposing the applicant to torture would be inconsistent with fundamental justice, the principle enshrined in art 7 of the Charter, mentioned earlier.

In Australia, a question of this kind remains within the province of the Minister for Immigration and Multicultural and Indigenous Affairs. The only recourse in case of an adverse decision is to go to one of the treaty bodies, either the Torture Committee or the Human Rights Committee. The Minister may reject the finding of a treaty body on the ground that it is not binding, but without ever having exposed the issue to the decision of an independent court.

Should States be bound?: the 'federal' issue

Federal/State issues on ratification

When the Covenant was being drafted, Australia had argued for the inclusion of a federal clause. This would have limited the obligations of the Federal Government to acting in its own sphere of responsibility and to making recommendations to constituent States to take action in theirs. Having failed in this, Australia felt obliged to reserve its position on arts 50 and 2 to make it clear that its own area of responsibility was limited. Later, after the extent of Commonwealth legislative power had been clarified by the Tasmanian Dam case and *Koowarta*, the reservation was modified and replaced by a declaration more positive in content, though still demarking the boundaries of responsibility between the Commonwealth and the States.

Canada did not enter a reservation.

Federal/State issues in a Bill of Rights

There is no doubt internationally that the Commonwealth Government has an obligation to ensure that the States and Territories conform to the Covenant. If a Bill of Rights were introduced, logically it should also extend to the States and Territories. However, there is a bit more than logic at stake here.

Canada worked out a solution under which the Provinces would be bound unless they took advantage of a provision enabling them to declare that a law would operate 'notwithstanding' certain provisions of the Charter. The Federal Parliament

could exercise the same option.[6] This rather neat solution puts an onus on each Parliament to consider whether proposed legislation will have an impact on rights and to decide whether it wants to override rights and to what extent.

However, it does not affect Canada's obligations under the Covenant. In a case where Quebec resorted to the 'notwithstanding' clause to re-enact laws limiting outdoor advertising in non-French languages, the parties affected came to the Human Rights Committee, as they could find no remedy in Canada; the alleged violation could not be dealt with under the Charter. The Human Rights Committee found that the legislation banning non-French language advertising violated freedom of expression. It was not saved by any of the permitted limitations.[7]

The Australian Constitutional Commission recommended that both Commonwealth and States be bound without the benefit of a 'notwithstanding' clause, though two members though that would have been a wise option.[8] If an Australian Bill of Rights included a 'notwithstanding' clause or otherwise, the obligations under international human rights instruments would not be affected.

Where to go?

Finally, my own view of the issues is that international human rights standards should govern the relationship between government, public authorities and people. As to who should be the guardian of those standards, my view is that it should be a responsibility of the Parliament, the Executive, the judiciary and the people.

We will only have a Bill of Rights if and when our elected representatives choose to introduce such a Bill, whether by constitutional amendment, leading to a referendum of the people, or by legislation. Should that occur, both the Parliament and the Executive would then be committed to ensuring that rights are implemented and respected by all public bodies; parliamentary scrutiny would be part of this. They should ensure through education that the community understands their own rights and responsibilities. Provision should also be made for effective remedies in case of violations of rights. This requires accessible procedures of mediation and, in the last resort, adjudication by independent courts. ●

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6 The 'notwithstanding' clause, s 33, applies only in respect of s 2 and 7-15.

7 Ballantyne, Davidson and McIntyre v Canada 385/1989 and 359/1989, views adopted March 1993, 47th vol 11, p 11.

8 Zines and Campbell, 9.210. As to who is bound, see para 9.167, Commonwealth and states, public functions.

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